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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~1412~~. 999

F. B. YORK, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED OCTOBER 18, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1412.

F. B. YORK, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

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1 *Caption.*

THE STATE OF TEXAS, *County of Travis:*

At a term of the district court, begun and holden at Austin, within and for the county of Travis, before the Hon. W. M. Key, and ending on the 22nd day of December, A. D. 1888, the following case came on for trial, to wit:

THE STATE OF TEXAS
vs. } No. 8554.
F. B. YORK.

Plaintiff's Original Petition. Filed February 15, 1888.

In the District Court of Travis County, Texas, to March Term, 1888.

THE STATE OF TEXAS
vs. } No. —.
F. B. YORK.

To the honorable the district court of Travis county, Texas:

The State of Texas, making itself plaintiff in this suit, complains of F. B. York, who will hereinafter be styled defendant, and plaintiff respectfully alleges and shows unto the court—

That the defendant resides in the county of Lipscomb, in the State of Texas, but may be found either in St. Louis county, Missouri, or Sumner county, Kansas, and citation is asked to all said places.

2nd. That the defendant, having applied to the State land board, in accordance with law and the rules of the said State land board, for the lease of the lands hereinafter described, was, on the 6th day of October, A. D. 1885, by order of the State land board, duly awarded the lease of said lands for the term of six years from the date of the said award at the annual rental of six cents per acre, payable annually in advance at the State treasury, in Travis county, Texas.

2 3rd. That, in pursuance of defendant's desire to lease the said lands and the said award thereof made to *them* by the said State land board as aforesaid, and under the authority of an act of the Legislature of the State of Texas approved on the 12th day of April, A. D. 1883, entitled "An act to provide for the classification, sale, and lease of the lands heretofore or hereafter surveyed and set apart for the benefit of the common school, university, the lunatic, blind, deaf and dumb, and orphan asylums," and in accordance with the orders, resolutions, and instructions of the said land board, the plaintiff (The State of Texas), acting by and through its said land board, did, on the 20th day of October, 1885, enter into a written contract with the defendant, leasing to the defendant for the term of six years from the said date of the award thereof as afore-

said eighty-seven (87) sections, each containing 640 acres of land, lying and being in the county of Lipscomb and State of Texas, at six cents per acre per annum, and all of the said lands belonging to the common-school fund of the State of Texas; that the said written contract of lease of the lands aforesaid was duly signed and executed in duplicate for plaintiff by its duly authorized agent, Randolph Lawrence, secretary of the said land board, and it was also duly signed and executed by the defendant, each party delivering to the other an original copy thereof; that by the terms of the said written contract of lease so signed, executed, and delivered by the defendant to plaintiff as aforesaid the defendant, for a valuable consideration (in the right to use, occupy, and enjoy the said lands so leased by plaintiff to defendant as aforesaid), agreed and bound *themselves* to pay to plaintiff, by payment to the treasurer of the State of Texas, at Austin, in Travis county, Texas, an annual rental of six cents per acre on the lands so leased in the county of Lipscomb and State of Texas as aforesaid; which said payments were, by the
3 terms of the said written contract, to be made annually in
advance, dating from the day of the said award of the lands to the defendant, and continuing during the full period of the said lease.

4th. That a substantial copy of the said written contract of lease (omitting the certificates of acknowledgment and endorsements thereon) so executed to plaintiff by defendant as aforesaid, containing the exact terms of the said contract and also a description of the lands so leased by number of the section and block, name of original grantee, certificate, quantity, location, and price per acre of lease is hereto attached, marked "Exhibit A," and hereby made a part hereof; that in said exhibit said lands are described as follows: In the column marked "sec." is given the number of section; in the column marked "block" is given the block; in column marked "original grantee" is given the initial letters of the railroad to which the certificate was granted as the name of the original grantee; in the column marked "certif." is given the number of the certificate by virtue of which it is located; in the column marked "quantity" is given the number of acres in survey; in the column marked "county" is given the county of the location of the land, and in the column marked "price" is given the price per acre at which same was leased.

5th. That, by reason of the execution of the said contract of lease by the defendant to the plaintiff as aforesaid, the defendant became justly indebted, liable, and bound to pay to the State treasurer of the State of Texas, at Austin, Travis county, Texas, for the plaintiff the said several sums of money specified and agreed upon as the rental on the said lands according to the tenor and effect of the said contract as aforesaid; and the defendant in and by said contract agreed and bound himself to submit to the jurisdiction of this court, and agreed that in all suits arising under said contract the venue should be laid in Travis county, Texas.

6th. That the plaintiff (The State of Texas) is now and has been

4 ever since the execution of the said contract as aforesaid the legal and equitable owner and holder thereof and entitled to receive and collect the said sums of money which defendant promised to pay as aforesaid.

7th. That the sum of $3,340.80 became due to plaintiff from defendant on the 6th day of October, 1886, on the said contract, and the sum of $3,340.80 became due to plaintiff on said contract by its terms on October 6th, 1887, but under the law plaintiff only claims six cents per acre per annum as rent on said contract since July 7th, 1887, and defendant is entitled to a rebate from the full amount due down to four cents per acre since said date; which said sums of money, together with eight per cent. interest thereon from the date of maturity, still *is* due and owing from the defendant to plaintiff.

8th. That defendant paid to plaintiff upon the said lease contracts the first annual payment, but, though long since due and though often requested, the defendant has wholly failed and refused and still so fails and refuses to pay to plaintiff or to the treasurer of the State of Texas for plaintiff any part of the annual payments due plaintiff as aforesaid, amounting in the aggregate to the sum of $6,641.60, less the amount of rebate as aforesaid, and interest, to plaintiff's damage in the sum of eight thousand dollars; and plaintiff alleges that the defendant owns and holds a large amount of property, both real and personal, in this State over which this court has jurisdiction, the said property being located in Lipscomb county, Texas, and consisting in lands and cattle and horses and other personal property.

9th. Premises considered, plaintiff prays for process pursuant to law, and on final trial of this cause that plaintiff have judgment against the defendant for the full amount of its debt, interest, and costs of suit, and for general, special, and equitable relief; and in duty bound will ever pray.

JAS. H. ROBERTSON,
Dist. Att'y 26th Jud. Dist. of Texas, Att'y for Plaintiff.

5

EXHIBIT A.

Lease.

THE STATE OF TEXAS, }
County of Travis. }

This instrument, this day executed by and between the State of Texas, party of the first part, acting by and through the State land board, and F. B. York, of St. Louis, Mo., party of the second part, witnesseth that, under the authority of an act approved on the twelfth day of April, 1883, entitled "An act to provide for the classification, sale, and lease of the lands heretofore or hereafter surveyed and set apart for the benefit of the common school, university, the lunatic, blind, deaf and dumb, and orphan asylum funds," and the orders, resolutions, and instructions of the said State land

board, the said State of Texas has leased to the said party of the second part, for the consideration hereinafter expressed, the follow-described land, to wit:

Section.	Block.	Original grantee.	Certif.	Quantity.	County.	Price.
200	43	H. & T. C. R. R. Co.	36–3798	640	Lipscomb.	.06
240	43	do.	36–3818	640	do.	.06
242	43	do.	36–3819	640	do.	.06
288	43	do.	36–3842	640	do.	.06
290	43	do.	36–3843	640	do.	.06
292	43	do.	36–3844	640	do.	.06
326	43	do.	36–3861	640	do.	.06
328	43	do.	36–3862	640	do.	.06
330	43	do.	36–3863	640	do.	.06
378	43	do.	36–3887	640	do.	.06
414	43	do.	36–3905	640	do.	.06
6						
416	43	do.	36–3906	640	do.	.06
418	43	do.	36–3907	640	do.	.06
466	43	do.	36–3931	640	do.	.06
556	43	do.	46–6439	640	do.	.06
588	43	do.	47–6455	640	do.	.06
640	43	do.	47–6481	640	do.	.06
642	43	do.	47–6482	640	do.	.06
676	43	do.	47–6499	640	do.	.06
678	43	do.	47–6500	640	do.	.06
682	43	do.	47–6502	640	do.	.06
728	43	do.	47–6525	640	do.	.06
730	43	do.	47–6526	640	do.	.06
732	43	do.	47–6527	640	do.	.06
734	43	do.	47–6528	640	do.	.06
764	43	do.	47–6543	640	do.	.06
766	43	do.	47–6544	640	do.	.06
768	43	do.	47–6545	640	do.	.06
818	43	do.	47–6570	640	do.	.06
820	43	do.	47–6571	640	do.	.06
822	43	do.	47–6572	640	do.	.06
852	43	do.	47–6587	640	do.	.06
854	43	do.	47–6588	640	do.	.06
904	43	do.	47–6613	640	do.	.06
906	43	do.	47–6614	640	do.	.06
908	43	do.	47–6615	640	do.	.06
910	43	do.	47–6616	640	do.	.06
940	43	do.	47–6631	640	do.	.06
942	43	do.	47–6632	640	do.	.06

Section.	Block.	Original grantee.	Certif.	Quantity.	County.	Price.
6½						
944	43	H. & T. C. R. R. Co.	47–6633	640	Lipscomb.	.06
946	43	do.	47–6634	640	do.	.06
992	43	do.	47–6657	640	do.	.06
994	43	do.	47–6658	640	do.	.06
996	43	do.	47–6659	640	do.	.06
998	43	do.	47–6660	640	do.	.06
1028	43	do.	47–6675	640	do.	.06
1030	43	do.	47–6676	640	do.	.06
1032	43	do.	47–6677	640	do.	.06
1034	43	do.	47–6678	640	do.	.06
1080	43	do.	47–6701	640	do.	.06
1086	43	do.	47–6704	640	do.	.06
1116	43	do.	47–6719	640	do.	.06
1170	43	do.	47–6242	640	do.	.06
1172	43	do.	47–6243	640	do.	.06
1174	43	do.	47–6244	640	do.	.06
1078	43	do.	47–6700	640	do.	.06
990	43	do.	47–6656	640	do.	.06
902	43	do.	47–6612	640	do.	.06
814	43	do.	47–6568	640	do.	.06
462	43	do.	36–3929	640	do.	.06
374	43	do.	36–3885	640	do.	.06
286	43	do.	36–3841	640	do.	.06
198	43	do.	36–3797	640	do.	.06
1036	43	do.	47–6679	640	do.	.06
948	43	do.	47–6635	640	do.	.06
860	43	do.	47–6591	640	do.	.06
772	43	do.	47–6547	640	do.	.06
508	43	do.	36–3952	640	do.	.06
420	43	do.	36–3908	640	do.	.06
332	43	do.	36–3864	640	do.	.06
7						
244	43	do.	36–3820	640	do.	.06
988	43	do.	47–6658	640	do.	.06
900	43	do.	47–6611	640	do.	.06
812	43	do.	46–6567	640	do.	.06
724	43	do.	47–6623	640	do.	.06
636	43	do.	47–6479	640	do.	.06
950	43	do.	47–6636	640	do.	.06
862	43	do.	47–8592	640	do.	.06
774	43	do.	47–5548	640	do.	.06
686	43	do.	47–6504	640	do.	.06
898	43	do.	47–6610	640	do.	.06

Section.	Block.	Original grantee.	Certif.	Quantity.	County.	Price.
810	43	H. & T. C. R. R. Co.	47–6566	640	Lipscomb.	.06
722	43	do.	47–6522	640	do.	.06
634	43	do.	47–6478	640	do.	.06
546	43	do.	47–6424	640	do.	.06
688	43	do.	47–6504	640	do.	.06
776	43	do.	47–6549	640	do.	.06

The said lease to continue for the term of six years from the 6th day of October, 1885, at which date the said State land board awarded the said land to the said party of the second part as the highest bidder therefor.

The said party of the second part agrees and binds himself hereby to pay the said State of Texas, by payment to the treasurer of the State, at Austin, an annual rental of six cents per acre on the land so leased; that said payments are to be made annually, in advance, from the date of award.

In all suits arising under this contract the venue shall be laid in Travis county, Texas.

This lease is made under the said act heretofore referred to, and the provisions of the said act and the rules, regulations, orders,
and instructions of the said board are here referred to and
8 made as essentially a part of this instrument as if fully re-
cited herein, and it is especially made subject to the right of
the State, as provided in said act, to sell said land or any part thereof.

And if the representations as to the character and quality of any part of said lands made in the application to lease are false this lease shall not be operative as to so much thereof as is so false.

It is agreed and understood that the said party of the second part shall not cut or remove the timber from any part of the said land nor permit it to be done; and if this provision is violated it shall be good and sufficient grounds for forfeiture, which forfeiture may be declared, without any judicial proceedings, by the executive officers of the State government or a majority of them.

This lease may be assigned by consent of the State land board or of the Governor upon the written request of the lessee setting forth the reasons for the desired transfer. The secretary of the State land board is authorized by resolution of the said board to sign and acknowledge for the board all their lease contracts. Executed in duplicate on this the 20th day of October, A. D. 1885.

RANDOLPH LAWRENCE,
Sec'y State Land Board.
F. B. YORK.

THE STATE OF TEXAS, }
County of Travis. }

Before me, the undersigned authority, this day personally appeared Randolph Lawrence, secretary of the State land board, to me well known, who acknowledged that he signed the foregoing lease contract for the uses and purposes therein contained and set forth.

9 Witness my hand and seal of office. Done at the city of Austin, Texas, this 20th day of October, 1885.

[SEAL.] R. C. SHELLEY,
Notary Public, Travis County, Texas.

THE STATE OF KANSAS, }
Sumner County. }

Before me, a notary public in and for the county and State aforesaid, this day personally appeared F. B. York, to me well known, who acknowledged that he signed the foregoing lease contract for the uses and purposes therein contained and set forth.

Witness my hand and seal of office. Done at Caldwell, Kansas, this 14th day of November, 1885.

[SEAL.] F. E. GILMORE,
Notary Public.

Commission expires Sept. 26th, 1889.

Endorsed on lease: The State of Texas to F. B. York. Lease. Lipscomb county. 87 secs., at 6 cents, $3,340.80. No. 6399. L. R. 370.

Notice to Serve Non-Residents.

The State of Texas to F. B. York, Greeting:

Whereas the State of Texas has instituted suit in the county of Travis, State of Texas, on the 15th day of February, A. D. 1888, — filed in the district court of Travis county, State of Texas, his petition in suit No. 8554 on the civil docket of said court, being suit brought by The State of Texas as plaintiff against F. B. York as defendant.

The nature of plaintiff's demand is as follows, to wit: An action to recover judgment for the amount due on lease contract, 10 plaintiff alleging the same to be the sum of $6,641.60, less the amount of rebate, to which the defendant may be entitled, all of which will more fully appear from the accompanying certified copy of plaintiff's petition.

And whereas the said petition will be heard in the said district court of Travis county, in the city of Austin, Texas, on the first Monday in March, A. D. 1888 (being the fifth day of March, A. D. 1888):

These are, therefore, to require you to appear at such time and place above stated and answer said plaintiff's petition, a certified copy of which accompanies this notice.

Attest: JAMES P. HART,
Clerk of the District Court in and for
Travis County, State of Texas.

Given under my hand and seal of said court, at office, in Austin, Texas, this the 15th day of Feb., A. D. 1888.

JAS. P. HART,
Clerk Dist. C't, Travis County, Texas.

Return.

THE STATE OF MISSOURI, }
City of St. Louis. }

Personally appeared before me, the undersigned authority, John J. Carey, who, being by me duly sworn, deposes and says that on the 24th day of February, A. D. 1888, at 9.30 o'clock a. m., in the city of St. Louis, State of Missouri, he delivered to F. B. York, the defendant, in person, a true copy of this notice, with a certified copy of the plaintiff's petition accompanying same; and, further, that he is an adult male and is in no manner interested in this suit.

JOHN J. CAREY,
Deputy Sheriff, City of St. Louis, Missouri.

Sworn to and subscribed before me this 21st day of March,
11 A. D. 1888.

[L. S.] PHILIP H. ZEPP,
Clerk of Circuit Court, City of St. Louis, State of Missouri.

Endorsed: No. 8554. District court, Travis county, Texas. State of Texas *vs.* F. B. York. Notice to serve non-residents. Issued Feb'y 15th, A. D. 1888. Jas. P. Hart, clerk district court, Travis county, Texas. Filed March 26th, A. D. 1888. Jas. P. Hart, clerk district court, Travis county, Texas.

Endorsed on petition: No. 8554. The State of Texas *vs.* B. F. York. Suit on lease contract. Plaintiff's original petition. Filed 15 day of February, 1888. Jas. P. Hart, clerk district court, Travis county, Texas.

Defendant's Plea to Jurisdiction. Filed March 9th, 1888.

STATE OF TEXAS }
vs. } No. 8554.
F. B. YORK. }

Suit pending in the district court of Travis county, to March term, 1888.

Now, at this day and time, comes F. B. York, defendant herein, and, saving unto himself all manner of defence by demurrer, exception, plea, and otherwise, and in nowise admitting the jurisdiction of this honorable court to hear and determine this suit, now here submits the following plea specially unto this court, viz: This defendant says that this honorable court is without jurisdiction to hear and determine this cause, because this defendant at the time he was served in this suit, viz., Feb. 24, 1888, was served by a notice to a non-resident addressed him, said notice being served on him in St.

Louis county, in the State of Missouri, and beyond the jurisdiction of this court, said so-called service being improper and illegal and not in accordance with law, the same having been served on this defendant, as shown by said notice (which is now here asked to be made a part of this plea for all purposes), being so served on
12 defendant when he was without the State of Texas, and so not amenable to its process; and this defendant further says, as appears from his affidavit herewith filed and prayed to be made a part of this plea, that, not being a resident of the State of Texas, this court is without jurisdiction to hear and determine this suit.

Wherefore defendant says that this court is without jurisdiction to further hear and determine this cause, and prays that he be hence discharged with all his costs in this behalf.

WEST & McGOWN,
Attorneys for Defendant.

The defendant reserves the right to amend and enlarge this said plea if it be necessary.

Affidavit.

STATE OF MISSOURI, }
City of St. Louis. }

Before me, the undersigned authority, duly commissioned and qualified under the laws of said State to take and administer oaths, on this day personally came and appeared F. B. York, well known to me, who, being by me duly sworn, says that he is now and was on February 15th, 1888, and has been continuously for the past eight years a resident citizen of the city of St. Louis, in this said State, nor was he on February 15th, 1888, nor is he now a resident of the county of Lipscomb, in the State of Texas; and affiant further says that he is the identical person who was served with process in a suit now pending in the district court of Travis county, Texas, numbered 8554, and styled The State of Texas *vs.* F. B. York; and affiant further saith not.

F. B. YORK.

[SEAL.] Sworn to and subscribed before me this sixth day of March, 1888.

JAS. W. ALLEN,
Notary Public.

Endorsed: No. 8554. The State of Texas *vs.* F. B. York. Defendant's plea as original answer. Filed March 9th, 1888. Jas. P. Hart, clerk.

13 *Pl'ff's 1st Supplemental Petition. Filed October 11th,* 1888.

In the District Court of Travis Co.

THE STATE OF TEXAS }
vs. } No. 8554.
F. B. YORK. }

And now, at this time, comes the plaintiff in said cause, by attorney, leave of the court having been first had and obtained, and files this plaintiff's first supplemental petition herein in reply to defendant's plea to the jurisdiction of this court; and plaintiff says—

That the defendant in his contract—which is the basis of this suit—agreed in writing to pay the money sued for in Travis county, Texas, and he further agreed in writing that any suit brought for the collection of the money due on the said contract should be brought in the district court of Travis county, as will fully appear from the said contract and the allegations of plaintiff's original petition.

Wherefore plaintiff says that the defendant in his said contract agreed and bound himself to submit to the jurisdiction of this court for the purpose for which this suit is brought, and he cannot now be heard to question the jurisdiction of this court; and plaintiff prays as in its original petition.

JAS. H. ROBERTSON,
Dist. Att'y and Attorney for Pl'ff.

Endorsed: No. 8554. The State of Texas *vs.* F. B. York. Plaintiff's 1st supplemental petition. Filed Oct. 11, 1888. Jas. P. Hart, clerk.

Defendant's First Supplemental Plea to the Jurisdiction. Filed October 19, 1888.

14 THE STATE OF TEXAS
vs. } No. 8554.
F. B. YORK.

Now comes the defendant in the above numbered and styled cause, by his attorneys, leave of the court being first had and obtained, and files this his first supplemental plea to the jurisdiction—and for this purpose only—supplementing his original plea to the jurisdiction filed herein on March 9, 1888, and by way of replication to plaintiff's first supplemental petition he says—

1st. That plaintiff's said 1st supplemental petition presents no defense to his plea to the jurisdiction of this court and is insufficient in law, and of this he prays the judgment of the court.

2nd. And, specially excepting, defendant says that true it is he promised to pay said lease money to the State treasurer, at Austin, Texas, and agreed that all suits arising on the said lease contract should have their venue laid in Travis county, Texas, but that said agreements in no way recognized nor accepted the jurisdiction of this honorable court over his person, nor did he thereby accept or waive service bringing him into this court, nor did he waive his right to object to said process, and of this he prays the judgment of this court.

WEST & McGOWN,
Att'ys for Def't, F. B. York.

Endorsed: 8554. State *vs.* F. B. York. Defendant's 1st supplemental plea to the jurisdiction. Filed Oct. 19, 1888. Jas. P. Hart, clerk.

Findings of Fact & Law by Court. Filed November 14, 1888.

In the District Court of Travis County.

THE STATE OF TEXAS }
vs. } No. 8554.
F. B. YORK. }

From the evidence introduced on the trial of this cause the court finds the following facts:

1st. That this suit was brought on the 15th day of February,
15 A. D. 1888, returnable to the March term, 1888, of this court, which began the first Monday in March, 1888, and that the defendant was served in person with citation, in St. Louis, Missouri, on the 24th day of February, 1888, in this cause, said citation and the service thereof being in strict conformity with the provisions of articles 1230 & 1231, Revised Civil Statutes of Texas.

2nd. That on the 9th day of March, 1888, the defendant, by his attorneys, filed among the papers of this cause a plea to the jurisdiction of this court (which plea will be embraced in the record), which was acted on by the court on the 20th day of June, 1888, being overruled by the court, and the cause was continued for the term until this term of the court, the order of the court overruling said plea being as follows:

"THE STATE OF TEXAS }
vs. } No. 8554.
B. F. YORK. }

On the 23rd day of May, 1888, came the parties, by their attorneys, when came on to be heard the defendant's plea to the jurisdiction of the court, and said motion, having been argued and submitted, was taken under advisement by the court until this the 20th day of June, 1888, when, said plea having been duly considered, it is ordered, adjudged, and decreed by the court that said plea be, and the same is hereby, overruled; to which ruling of the court the defendant in open court excepts."

3rd. That at the present term of this court, to wit, on the 5th day of October, 1888, the defendant, by his attorneys, appeared in open court and demanded a jury in this case and paid the jury fee and had this case transferred to the jury docket.

4th. That on the 6th day of October, 1888, the defendant, by his attorneys, again renewed their plea to the jurisdiction of the court, asking that the court again pass upon the same (the judge of this court having been changed since its last term), and on the 3rd
16 day of November, 1888, the court again overruled the plea to the jurisdiction, making the following order thereon:

"THE STATE OF TEXAS
vs. No. 8554.
F. B. YORK.

On the 6th day of October, 1888, came the parties, by their attorneys, when came on to be heard the motion and plea of the defendant to the jurisdiction of this court in this cause, and the same, having been argued, was submitted and taken under advisement by the court, and the court having granted the plaintiff leave to file 1st supplemental petition and the defendant exceptions to the same, and now, on this the 3rd day of November, 1888, having fully considered all the questions of law presented by said pleadings and supplemental pleadings, the court doth order, adjudge, and decree that defendant's exceptions to plaintiff's first supplemental petition be, and the same are hereby, overruled, and defendant's plea to the jurisdiction of this court be, and the same is hereby, overruled; to which rulings of the court the defendant in open court excepts."

5th. That on this the 14th day of November, 1888, when this cause was reached and called for trial, the defendant, by his attorneys, in open court waived his right of trial by a jury and his demand of a jury and declined to further answer in this cause, relying solely on his plea to the jurisdiction, and the case was thereupon submitted to the court by the attorney for the plaintiff without a jury, defendant's attorneys being present.

6th. The court further finds that the defendant executed the lease contract sued upon, as charged in plaintiff's petition, a true copy of which said contract is attached as an exhibit to plaintiff's petition (which is a part of the record), to which reference is here made for the exact terms of the said contract, it being expressly agreed in said contract that the venue of any suit thereunder should be laid in Travis county, Texas.

17 7th. The court further finds that at the date of the institution of this suit there was due the plaintiff from the defendant on said contract the sum of $4,732.80, principal, besides interest, which in the aggregate now amounts to the sum of $5,957.75 that is due to plaintiff from defendant on said contract for the two years beginning October 6th, 1886, and ending October 6th, 1888.

From the foregoing findings of fact as matter of law the court holds that the plaintiff is entitled to a judgment against the defendant for the sum of $5,957.75, for which amount judgment will be entered herein.

Being requested by counsel for defendant to state my conclusions of law upon the defendant's plea to the jurisdiction of this court, I will say that in addition to the written conclusions of law filed herein by my predecessor at the last term of the court, which the clerk will copy herein, I find that the stipulation in the contract sued on whereby defendant agreed that any suit to enforce said contract might be brought in Travis county, Texas, binds him to submit to the jurisdiction of this court after being served in the manner provided by the statute, though he be a non-resident of the State, as is shown by his plea to jurisdiction.

Judge Townes' conclusions of law being as follows:

Conclusions by Judge Townes.

In District Court of Travis Co., Tex. March Term, 1888.

THE STATE OF TEXAS
vs. } No. —.
F. B. YORK.

Conclusions of law on plea to the jurisdiction and sufficiency of service.

This is suit brought by the State of Texas on a monied demand against the defendant, who is and at the institution of this suit was a non-resident of the State.

Service was had on him by sending a copy of petition and citation to a credible party without — State and having same delivered to him and affidavit returned, as prescribed in articles 1230 *et seq.* of Revised Statutes.

18 The defendant makes a special plea that there is no service on him such as will give the court jurisdiction over his person.

The petition does not pray for any attachment or other process directed toward any property of defendant within the State, but does allege that the defendant owns property therein, nor does the plea to the jurisdiction deny that the defendant has property within the State.

If the statutes above referred to are valid the defendant is properly in court; if not, the court has no jurisdiction to render any judgment at all in the premises against him or his property.

There is no difference in the legal principles involved in this statute and those prescribing service by publication on non-residents, and so cases bearing on the latter will be equally applicable to the case at bar.

It is the settled doctrine of the Supreme Court of the United States that such extraterritorial service is void. (Pennoyer *vs.* Neff, 95 U. S., 714; N. Y. Life Ins. Co. *vs.* Bangs, 103 U. S., 439.)

This doctrine is also recognized in a large majority of the States which have passed on the question; at least such is the result of the examination I have made into the reports and references from text books. See—

Lapham *vs.* Campbell, 61 Cal., 297.
Jones *vs.* Wardner, 81 Ill., 348.
City Fire Ins. Co. *vs.* ——, 41 Ga., 670.
Smith *vs.* Easton, 36 Me., 298.
Bright *vs.* Boynton, 37 N. H., 18.
Williams *vs.* Bacon, 10 Woods, 238.
Newcomb *vs.* Peck, 17 Vt., 302.
Wright *vs.* Andrews, 130 Mas., 140.
Rope *vs.* Heaton, 9 Wis., 332.
Williams *vs.* Weston, 28 Ohio St., 469.
19 Parrott *vs.* Ala. L. Ins. Co., The Reporter, vl. 11, 425.
Clayton *vs.* Clayton, 4th Col., 415.
King *vs.* Vance, 46 Ind., 246.
Cooper *vs.* Smith, 25th Iowa, 269.

I have only found one State, New Jersey (not including Texas), which holds such service good as basis for a judgment good within the State where rendered (Mutual Life Ins. Co. *vs.* Penner, 10th Atlantic Reporter, 184), so that it may be safely said that the great weight of authority is against the validity of such service for any purpose, and it is certainly very desirable that on a matter affecting property rights so vitally and in so many ways that there should be complete uniformity of decision in all the States.

There is a long line of decisions in Texas, beginning early in the history of our jurisprudence, relating to this subject. See—

McMullen *vs.* Guest, 6 Texas, 279.
Campbell *vs.* Wilson, 6 Texas, 391.
Word *vs.* Lathrop, 11 Texas, 291.
Grossmeyer *vs.* Beeson, 13 Texas, 528.
Butterworth *vs.* Kinsig, 14 Texas, 499.
Mickie *vs.* McGeehee, 27 Texas, 139.
Lawler *vs.* White, 27 Texas, 254.
Johnson *vs.* Herbert, 45 Texas, 304.
Liles *vs.* Woods & Co., 58 Texas, 416.
Jones *vs.* Jones, 60 Texas, 451.
Rice, Stix & Co. *vs.* Poteet, 66 Texas, 568.
Quin *vs.* Brown, 61 Texas, —.

Without going into a discussion of them at length the doctrine fairly deducible from them is—

1st. That if neither plaintiff nor defendant resides in Texas and the defendant has no property in this State there is no jurisdiction.

20 2nd. That if either plaintiff or defendant resides in the State or the defendant has property here the courts will have jurisdiction to determine the case if proper service be had on the defendant or he enter an appearance or the property be seized. On these points there is no difficulty.

3rd. That service by publication without seizure of the defendant's property will give to the court jurisdiction over the case to the extent that it can render judgment against the defendant which can be enforced against property belonging to him situated in this State, though such judgment will have no extraterritorial force or standing.

To break the force of this line of decisions defendant relies on two cases decided by our supreme court, neither of which has been as yet published in our supreme court reports. The first is that of Nichols *vs.* Wimmer, rendered at Tyler, term 1884 (The Reporter, vol. 19, page 475). This case closes in these words:

"To avoid doubt upon the subject in future it is deemed proper to remark that the doctrine announced in Pennoyer *vs.* Neff, 5th Otto, 714, with reference to proceedings against non-residents in State court, is fully recognized as authoritative."

This seemed to me on casual reading to be conclusive and to overrule the line of decisions above cited, but an examination of the case discloses that the case turned on the recitals of service contained in the judgment which was attacked. If the service thus evidenced was personal, then Pennoyor *vs.* Neff had no application to the case, and if it were by publication, then the actual decision of the case, to wit, that a judgment based on such service was good, was contrary to Pennoyer *vs.* Neff, and in either event the quotation above made would not be authoritative.

In the second case—that is, Stewart *vs.* Anderson—decided May 1st, 1888, the record showed a state of case which negatived
21 conclusively any service, either personal or constructive, as to the cause of action on which the judgment was based, and consequently the judgment was void under either line of decisions, and so the reference to Pennoyer *vs.* Neff in that case is not authority.

These cases indicate that it is probable that our supreme court will follow the United States Supreme Court when the question comes up for adjudication, but it has not yet done so (as I understand the opinions).

I do not think it proper for the district court to change rules of law adopted by the supreme court of the State on the construction of State statutes, whatever may be the individual opinion of the judge as to the desirability of such change. Governed by what I understand to be the authoritative rulings of our State supreme court, I held the service good to give the court jurisdiction to try the issues presented, and, if the plaintiff sustains her case, to render a judgment which will be good within the State.

In coming to this conclusion I have not regarded the stipulations in the contract making the money due in Austin and fixing the venue of any litigation in Travis county, which may be entitled to some weight as agreements giving to the Travis county courts jurisdiction over the person of the defendant. The plea to the jurisdiction will be overruled.

JNO. C. TOWNES,
Judge 26th District, Texas.

Endorsed: No. 8554. The State of Texas *vs.* F. B. York. Conclusions of law on plea to jurisdiction. Filed June 20th, 1888. Jas. P. Hart, clerk. W. M. Key, judge presiding.

Endorsed: 8554. The State of Texas *vs.* F. B. York. Findings of fact and law by the court. Filed November 14th, 1888. Jas. P. Hart, clerk.

22 *Judgment.*

WEDNESDAY, *Nov.* 14*th*, 1888.

THE STATE OF TEXAS
vs. } No. 8554.
F. B. YORK.

And now, on this the 14th day of November, 1888, this cause being regularly called for trial and reached on the docket, comes the plaintiff, by the district attorney, and announced ready for trial, and the attorneys for the defendant, being present in open court, waived the jury heretofore demanded by the defendant, and stated to the court that they would not further answer in this case, inasmuch as their plea to the jurisdiction had been overruled, but rely on same; and, it appearing to the court that the defendant had been duly served in St. Louis, Mo., in conformity with the provisions of articles 1230 and 1231 of the Revised Civil Statutes of the State of Texas, and that a plea to the jurisdiction of this court entered by the defendant has heretofore been overruled by the court, thereupon the plaintiff proceeded to trial of the case before the court without the intervention of a jury, and, after hearing the pleadings, evidence, and argument of counsel, the court files its findings of facts and conclusions of law herein, and renders judgment for the plaintiff for the sum of $5,957.75.

It is therefore considered and ordered by the court that the plaintiff, The State of Texas, do have and recover of and from the defendant, F. B. York, the sum of five thousand nine hundred and fifty-seven and $\frac{75}{100}$ dollars, with interest thereon from this date at the rate of 8 per cent. per annum, and all costs of suit, for all which let execution issue; to which findings of the court and judgment thereon the defendant, by attorneys, appeared and excepted, and in open court gave notice of appeal to the supreme court, said attorneys for defendant appearing for no other purpose.

23 *Assignment of Errors. Filed December 13th*, 1888.

In District Court of Travis County.

THE STATE OF TEXAS }
vs. } No. 8554.
F. B. YORK. }

Now, at this day and time comes the defendant and appellant herein and makes the following assignment of errors:

1st. The court below erred in overruling defendant's plea to the jurisdiction.

2nd. The court below erred in holding as a matter of law that the stipulation in the contract sued on whereby defendant agreed that any suit to enforce said contract might be brought in Travis county, Texas, binds the defendant to submit to the jurisdiction of the district court of Travis Co. after being served in the manner provided by the statute, the defendant being a non-resident.

3rd. The court below erred in finding as a conclusion of law that the stipulation in the lease contract as to venue in suits arising thereon gave the district court of Travis county jurisdiction over the person of the defendant.

4th. The court below erred in holding that it had jurisdiction to hear and determine this cause when it affirmatively appeared from the defendant's plea to the jurisdiction that he was a resident of the State of Missouri and not a resident of the State of Texas.

5th. The court below erred in holding that the service of citation upon defendant while in the State of Missouri, and he being a resident of that State, was sufficient to enable the court to render a judgment against the defendant, and the court erred in rendering such judgment.

6th. The court below erred in holding as a matter of law that articles 1230 *et seq.*, Revised Statutes of Texas, are valid and binding on a non-resident, such as the defendant herein.

24 7th. The court below erred in not sustaining the defendant's plea to the jurisdiction on the ground that he, being a resident of the State of Missouri, was not amenable to the courts of Texas by process issuing out of Texas and served on defendant while in the State of Missouri.

8th. The court below erred in permitting the district attorney to go ahead and submit said cause, no answer to the merits having been filed by the defendant, and thus in a manner the cause being tried *ex parte*.

9th. The court erred in rendering judgment on the merits for the plaintiff, the defendant, by his counsel, protesting against such action, and no answer to the merits having been filed. And because of the errors above recited the judgment of the lower court should be reversed and the cause dismissed, which is now asked to be done.

WEST & McGOWN,
Att'ys for F. B. York, Defendant and Appellant Herein.

Endorsed: No. 8554. The State of Texas *vs.* F. B. York. Assignment of errors. Filed Dec. 13, 1888. Jas. P. Hart, clerk.

Appeal Bond. Filed December 13th, 1888.

THE STATE OF TEXAS
vs. No. 8554.
F. B. YORK.

Suit pending in district court of Travis county.

Whereas in the above numbered and entitled cause, pending in the district court of Travis county, and at a regular term of said court, to wit, on the 14th day of November, 1888, the said State of of Texas, plaintiff herein, recovered judgment against F. B. York, the defendant herein, for the sum of ($5,957.75) five thousand nine hundred and fifty-seven and $\frac{75}{100}$ dollars, with interest thereon
25 from said 14th day of November, 1888, at 8 per cent. per annum, and all costs of suit, from which judgment the said F. B. York has taken an appeal to our supreme court:

Now, therefore, we, F. B. York, as principal, and Jno. W. Maddox and C. E. Anderson, as sureties, acknowledge ourselves bound to pay the State of Texas, the plaintiff herein, the sum of ($300) three hundred dollars, conditional that the said F. B. York, appellant, shall prosecute his appeal with effect and shall pay all the costs which have accrued in the court below or which may accrue in the appellate court.

Witness our hands this the — day of December, 1888.

F. B. YORK,
By WEST & McGOWN, *His Att'ys.*
JNO. W. MADDOX.
C. E. ANDERSON.

I have fixed the probable amount of costs of the suit of both the appellate court and the court below at 150.00 dollars, and approve the foregoing this 13th day of December, 1888.

JAS. P. HART,
Clerk District Court, Travis County.

26 *Bill of Costs.*

THE STATE OF TEXAS
vs.
F. B. YORK.
} No. 8554.

Clerk's fees:	
Docketing suit	20
Issuing 1 cit. & dup.	75
Issuing 2 notices & dup.	3 00
Issuing 3 copies petition and certificate	21 00
Entering appearance	30
Ent. continuance	20
Ent. 1 motion	15
Ent. 3 orders and decree	2 25
Taking appeal bond	1 50
Filing 10 papers	1 50
Ent. judgment	75
Assessing damages	50
Taxing cost	25
Transcript	18 00
Clerk's costs	$50 35

Sheriff's fees:	
Service p'd by State	1 50
M. M. Hornsby, venire fee	50
	2 00
Clerk's costs	$50 35
Total costs	$52 35

27 *Certificate of Clerk of the District Court.*

THE STATE OF TEXAS, *County of Travis:*

I, Jas. P. Hart, clerk of the district court within and for said county and State, do hereby certify that the foregoing thirty-three (33) pages contain a true and correct transcript of all the proceedings, orders, judgment, &c., had in cause No. 8554, of The State of Texas *vs.* F. B. York, as same appear now on file and of record in this office.

[SEAL.] Witness my hand and official seal, at office, in Austin, this the 3rd day of Jan., A. D. 1889.

JAS. P. HART,
Clerk District Court, Travis Co., Texas.

Certificate of Clerk of the Supreme Court.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the above and foregoing twenty-six (26) pages contain a true and correct copy of the original transcript of the record in cause No. 8554 of the docket of the district court of Travis county, entitled therein The State of Texas, plaintiff, *vs.* F. B. York, defendant, and which said transcript is endorsed in this court as follows: No. 6775. F. B. York, appellant, *vs.* The State of Texas, appellee. From the district court of Travis county, and which said transcript was filed in the supreme court, at Austin, the 15th day of March, A. D. 1889, and is still on file in this office.

Seal Supreme Court of the State of Texas.

To certify which I hereunto sign my name and affix the seal of the supreme court of Texas, at Austin, this the 28th day of August, A. D. 1889.

CHAS. S. MORSE, *Clerk, &c.*

28 *Order of Submission.*

In the Supreme Court of Texas.

F. B. York, Appellant,
vs.
The State of Texas, Appellee.
No. 6775. Appeal from Travis County.

April 25th, 1889.—Submitted on briefs for both parties.

Motion to Give Precedence.

F. B. York, Appellant,
vs.
The State of Texas, Appellee.
No. 6775. Appeal from Travis County.

And now comes the appellee, by its attorneys, in said above styled and numbered cause, and shows to the court that it and the following styled and numbered causes, to wit, W. S. Cunningham *et al.*, appellants, *v.* The State of Texas, appellee, No. 6776; C. L. Neville, appellant, *v.* The State of Texas, appellee, No. 6777; T. L. Oglesby's Sureties, appellants, *vs.* The State of Texas, appellee, and the State of Texas, appellant, *vs.* T. L. Oglesby *et al*, appellees, No. 6795, pending in this court, are cases involving questions which relate to the administration of the Government and are of general public interest, being actions to recover revenues belonging to the State. Wherefore it is prayed that said causes be given precedence in their consecutive order.

J. S. HOGG,
Attorney General.
J. H. ROBERTSON,
District Attorney, for the State.

Endorsed: No. 6775. Motion No. 412. F. B. York *vs.* The State. To give precedence. Filed in supreme court, at Austin, the 15th day of April, A. D. 1889. Chas. S. Morse, clerk. April 24th, 1889, motion submitted. April 25th, 1889, motion granted.

29

F. B. YORK, Appellant,
vs.
THE STATE OF TEXAS, Appellee. } # 6775. Appeal from Travis County.

This action was brought by the State of Texas against F. B. York, a resident citizen of the State of Missouri, to recover the sum due to the State under a lease contract made between the parties.

No service of citation was made on appellant within this State, but notice was served upon him in the State of Missouri in accordance with art's 1230, 1231, 1232, 1233, R. S.

Appellant, by proper pleading and in proper time, denied the jurisdiction of the court over him personally, questioning the sufficiency of the notice served in the State of Missouri to confer it.

This plea was overruled June 20, 1888, and the cause was continued for the term.

At the ensuing term appellant demanded a jury, paid the jury fee, and caused the case to be transferred to the jury docket, and on the next day renewed his plea to the jurisdiction of the court over his person, which was again overruled.

Appellant then "waived the jury heretofore demanded by defendant, and stated to the court that he would not further answer in this case, inasmuch as his plea to the jurisdiction had been overruled, but rely on the same;" after which, on hearing, a judgment was rendered in favor of the State, from which this appeal is prosecuted.

In reply to appellant's plea to the jurisdiction the State pleaded that by the lease contract appellant had bound himself to pay the money sued for in the county in which the suit was brought, and that he had agreed in writing that any suit to be brought for the collection of money due on the contract sued on should be brought in that county.

The lease contract contained agreements such as alleged, 30 and the court below held that the part of the agreement last named bound appellant to submit to the jurisdiction of the court after notice made without the State was given in the manner prescribed by the statutes before referred to.

Since the decision made in the case of Pennoyer *vs.* Neff (95 U. S., 723) it must be held that since made without this State, as it was upon appellant, is sufficient to confer jurisdiction on a court of this State to render a mere personal judgment against one a citizen of and resident in another State. Freeman *vs.* Alderson, 119 U. S., 185; Hart *vs.* Sansum, 110 U. S., 151; Harkness *vs.* Hyde, 98 U. S., 476; Cooper *vs.* Reynolds, 10 Wall., 309.

One of the grounds on which the decision in Pennoyer *vs.* Neff is based makes it authoritative throughout the Union in all cases to which it is applicable, and, although there may have been some decisions made in this State asserting a contrary rule, we feel bound to follow it.

In this case there was no judgment sought or rendered other than one strictly personal in its character.

It seems to be claimed that appellant made an appearance in the court below, and is therefore bound by its judgment.

If it be true that he made such an appearance as gave the court jurisdiction over him personally, then it is unimportant whether the process or notice served on him without this State is of any validity whatever, for if the court below so acquired such jurisdiction, then the fact of non-residence of appellant is a matter of no importance.

If found within this State, and here served with proper process, this gives to a court of this State jurisdiction to render a personal judgment against a non-resident as fully as does the service of such process on a citizen of this State clothe the court with
31 such power, unless it be in a case in which the plaintiff is
also a non-resident and the defendant without property within the State.

Whenever the service of proper process will clothe a court with such jurisdiction, then that which is to be deemed in law an appearance by a defendant will confer on a court the like power.

What is to be deemed an appearance may be determined by statute, and a statute declaring what shall be deemed an appearance, which makes notice to defendant of the pendency of an action against him, opportunity to know its nature and fully to defend it necessary, does not contravene the letter or spirit of any constitutional provision intended for the protection of private right.

An appearance is said to be strictly voluntary when without the service of a process a defendant in some manner indicates his intention to submit his person and cause to the jurisdiction of the court.

Art. 1241, R. S., provides that "the defendant may, in person or by attorney or by his duly authorized agent, enter an appearance in open court, and such appearance shall be noted by the judge upon his docket and entered in the minutes, and shall have the same force and effect as if citation had been duly issued and served as provided by law."

The succeeding article provides that "the filing of an answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him."

In either of the cases here provided for the doing of the act prescribed would operate as a voluntary appearance in any case in which no process whatever had been served, and so simply because it would clearly indicate the intention of the defendant to submit his person to the jurisdiction of the court.

The record before us, however, leaves no ground for claim that appellant intended voluntarily to submit himself to the jurisdiction of the court, which from first to last he resisted.
32

His appearance was special and declared to be restricted to the sole purpose of presenting and having acted upon his plea to the jurisdiction of the court over his person, and prior to the adoption of the Revised Statutes there can be no claim that such an appearance under the facts of this case would have given jurisdiction over the person of appellant. De Witt *vs.* Monroe, 20 Tex., 293; Harkness *vs.* Hyde, 98 U. S., 476.

That appellant made at least a special appearance in the court below cannot be questioned, and it was not a compulsory appearance, for no process had been served on him which compelled him to appear or take the consequence of default, nor had any of his property been seized under process which made it necessary for him to appear in order to protect it or his rights in it.

A judgment entered against him as the case stood before he appeared would have been a nullity.

His appearance was optional, and jurisdiction could not have been obtained over his person so long as he remained beyond the limits of this State unless by his voluntary act.

The inquiry arises whether the Revised Statutes have given to a special appearance by a defendant the full effect in respect to jurisdiction which before their adoption was given only to a general appearance.

It is now provided that "when the citation or service thereof is quashed on motion of the defendant the case may be continued for the term, but the defendant shall be deemed to have entered his appearance to the succeeding term of the court." R. S., 1243.

Before the enactment of this law an appearance for the purpose of having citation or service thereof quashed would not have been held to confer jurisdiction on the court over the person of defendant, but such now is evidently made the effect of such an
33 appearance, and further issuance and service of process becomes unnecessary, even when it is held that the citation or service was insufficient.

The purpose of a motion asking that a citation or its service be quashed is simply to have an adjudication that these are not sufficient to give the court jurisdiction over the defendant.

The appearance of appellant, though by plea, was only to have an adjudication of the insufficiency of the process and service through which he was attempted to be brought into court to give the court jurisdiction over his person.

Whether this question be raised by motion or plea, the appearance is for the same purpose and of the same character, and must be given the same effect.

In the one case, as in the other, the appearance is made for the sole purpose of questioning the jurisdiction of the court over the person of the defendant, which is as much wanting when the citation or service made on a resident of the State is not in accordance with law as is it when process is served on a defendant beyond the limits of the State whose process it is.

It is not the fact that the motion to quash a citation or service is sustained which operates as an appearance, but it is the fact that a defendant appears and asks an adjudication which makes the appearance. Railroad *vs.* Brett, 61 Tex., 497; Keener *vs.* Duff, 66 Tex., 185.

This as well as the spirit of the statute is further illustrated by the succeeding article, which provides: "When the judgment is reversed on appeal or writ of error taken by the defendant for the want of service or because of defective service or process no new citation shall be issued or served, but the defendant shall be presumed to have entered his appearance to the term of the court at which the mandate shall be filed." R. S., 1244.

Under the statutes of this State all defensive pleadings are
34 styled the "answer," and among these are pleas questioning
the jurisdiction of the court over the defendant. Richardson *vs.* Pruitt, 3 Tex., 227; Hopkins *vs.* Wright, 17 Tex., 36; R. S., 1262.

In view of this fact and in the light of the statutes to which we have referred it must be held, under art. 1242, R. S., that a defendant who files any defensive pleading makes such an appearance as gives the court jurisdiction over his person as fully as would the issuance of proper citation and its proper service within this State.

One not a citizen or resident of this State is subject to be sued here, and we know of no ground on which the courts of this State can be denied jurisdiction over the person of such a defendant when by his own act he makes such appearance in its courts as would give them jurisdiction over a person here resident.

The State cannot send its process abroad and thus compel a non-resident defendant to submit his person to the jurisdiction of its courts, but if, in the exercise of his own untrammeled volition, he makes an appearance, then he must be held bound thereby as would be one who could be but had not been subjected to the jurisdiction of the courts here by the proper issuance and service of process.

The purpose for which appearance is made is unimportant, as is the intention with which it is made, if the act done is one which the statute declares is such as gives to the court jurisdiction to render a personal judgment against the person appearing.

In the case of Liles *vs.* Words (58 Tex., 419) it was not necessary to consider the statutes bearing on the question before us, and attention was not called to the fact that the same rules in force in the district courts as to appearance were by statute made applicable to justices' courts; and there is an expression in the opinion in that case not necessary to its decision, from which it might be understood that a defendant served as was the defendant in this case was not
bound by his appearance when his exceptions to service were
35 sustained.

The appellant had notice of the action and of the claim the State was seeking to enforce against him, with full opportunity to defend, and must be held to have given the court jurisdiction to render the personal judgment against him.

The proposition that the agreement contained in the lease contract gave the court jurisdiction over the appellant, we think, cannot be sustained.

That agreement may have fixed the venue, but it could not operate as an acceptance, waiver of service, or appearance; but because of the appearance the court had jurisdiction, and its judgment must be affirmed.

STAYTON,
Chief Justice.

Opinion delivered May 7th, 1889.

Clerk's Office, Supreme Court.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the above and foregoing six pages contain a true and correct copy of the opinion of the supreme court in cause #6775, entitled F. B. York, appellant, *vs.* The State of Texas, appellee.

Witness my hand and the seal of said court this the 28th day of August, A. D. 1889.

[Seal Supreme Court of the State of Texas.]

CHAS. S. MORSE, *Clerk, &c.*

36 *Judgment of the Supreme Court.*

F. B York, Appellant,
vs.
The State of Texas, Appellee.
No. 6775. Appeal from Travis County.

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is considered, adjudged, and ordered that the judgment of the court below be in all things affirmed; that the appellant, F. B. York, and his sureties, John W. Maddox and C. E. Anderson, pay all costs in this behalf expended, and this decision be certified below for observance.

Clerk's Office, Supreme Court.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the above is a true and correct copy of the judgment rendered by the supreme court in cause No. 6775, entitled F. B. York, appellant, *vs.* The State of Texas, appellee, as the same is entered of record on page 266, under date of May 7, 1889.

Witness my hand and the seal of said court this the 28th day of August, A. D. 1889.

[Seal Supreme Court of the State of Texas.]

CHAS. S. MORSE, *Clerk, &c.*

Motion for Rehearing.

37 F. B. York, Appellant,
vs.
State of Texas, Appellee.
No. 6775. Appeal from Travis County.

Now comes the appellant, by his attorneys, and for the purposes of this motion alone, and respectfully requests that this honorable court grant him a rehearing in this cause because of the matters hereinafter set out, viz:

1st. Because this appellant never did, in any manner or by any act, voluntarily submit himself to the jurisdiction of the district court of Travis county.

2nd. Because this court should have sustained appellant's plea to the jurisdiction of the district court of Travis county, he never having voluntarily appeared and answered therein, but having appeared in response to the notice served on him while in St. Louis, in the State of Missouri, and then only appearing under protest, solely for the purpose of contesting the jurisdiction of said district court and never at any time answering to the merits.

3rd. Because this court under the law should not have held that, though appellant having appeared under protest in response to said notice, for the sole purpose of contesting the jurisdiction of the district court of Travis county, that under Revised Statutes of Texas, art. 1242, his appearance for such purpose even gave the district court of Travis county jurisdiction over his person.

4th. Because a proper construction of article 1242 above referred to, taken in connection with the record in this cause, is that the plea to the jurisdiction urged by appellant does not make him submit to the jurisdiction of the district court of Travis county, his sole purpose in interposing said plea being to contest the right of that court to hear this cause.

5th. Because appellant's plea to the jurisdiction, as the same appears in the record herein, is not such motion or answer
38 as is contemplated by R. S. of Texas, arts. 1242, 1243, and 1244.

6th. Because the effect of the opinion rendered by this court, in holding that appellant has submitted himself to the jurisdiction of the district court of Travis county, is to deprive appellant of a right and valid defence guaranteed him by the constitution of the State of Texas and of the United States respectively.

7th. Because the court in its opinion compels appellant, a nonresident defendant, to submit himself to the jurisdiction of the district court of Travis county by applying to and making binding on him a different State statute, to wit, R. S., art. 1242, when appellant has appeared only for the purpose of questioning the validity of the R. S., art. 1230 *et seq.*, said art. 1242, as construed by this court, being as much in contravention of law and open to the same objections as arts. 1230 *et seq.*

8th. Because the statutes of Texas with reference to the appearance of a defendant as appellant herein were not changed by the Revised Statutes of Texas enacted in 1879, said Revised Statutes in effect re-enacting the old law.

9th. This court, in the state of the record in this cause—no such question as to appearance being raised by appellee in the court below or presented in the record herein, appellee never having assigned errors—should have disregarded the same, and this court should have decided this cause without any reference to that question.

Wherefore, under all the premises is a rehearing asked and the court requested to reverse and dismiss this cause.

WEST & McGOWN,
Attorneys for F. B. York, Appellant.

Waiver of Time & Acceptance of Service.

Time and service of copy of this motion is waived and service of same is now accepted.

J. S. HOGG,
Attorney General.

Filed in supreme court May 16, 1889.

CHAS. S. MORSE, *Clerk.*

39 *Order Submitting Motion.*

F. B. YORK, Appellant,
vs.
THE STATE OF TEXAS, Appellee.
} No. 6775. Motion of Appellant for Rehearing.

May 17, A. D. 1889.—Motion for rehearing submitted.

Order Overruling Motion.

F. B. YORK, Appellant,
vs.
THE STATE OF TEXAS, Appellee.
} No. 6775. Motion No. 528. June 18, A. D. 1889.

This day in this cause came on to be heard the motion of appellant for a rehearing, and the same having been considered, it is ordered that the said motion be, and the same is hereby, overruled.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the above and foregoing one page contains a true and correct copy of appellant's motion for rehearing and the order submitting the same, together with the order of the court overruling said motion, as the same appears from the record and files in my office.

Seal Supreme Court of the State of Texas.

Witness my hand and the seal of said court this the 28th day of August, A. D. 1889.

CHAS. S. MORSE, *Clerk, &c.*

40 *Petition for Writ of Error.*

In Supreme Court of Texas.

F. B. YORK, Appellant,
vs.
THE STATE OF TEXAS, Appellee.
} # 6775.

To the Honorable John W. Stayton, chief justice of the supreme court of Texas:

Your petitioner F. B. York, a resident citizen of the State of Missouri, would respectfully allege as follows, complaining in this behalf of the State of Texas, that the State of Texas, acting by and through her attorney general, J. S. Hogg, and her district attorney, Jas. H. Robertson, instituted an action in the district court of Travis county against your petitioner, F. B. York, to recover from him certain lease moneys claimed to be due the State under and virtue of written contract of lease entered into between petitioner and the State of Texas, acting through its proper officers, and the State of

Texas as plaintiff merely sought a personal judgment against your petitioner. In the petition of plaintiff it was alleged that your petitioner was a resident of Lipscomb county, Texas, but process was asked in addition to St. Louis, Mo., in accordance with Revised Civil Statutes of Texas, art. 1230 *et seq.*, which provides for service on defendants outside of the limits of the State of Texas by notice served upon them by any person competent to make oath of the fact, and authorizing personal judgments against such non-resident defendants upon such service being had, and this petitioner will state that he was served by such notice on — day of February, A. D. 1888, and that on March 9th, 1888, thereafter your petitioner, appearing, by his attorneys, for that purpose alone and for no other, filed his plea to the jurisdiction, questioning the sufficiency of the service had on him in St. Louis, Mo., and claiming to be a resident citizen of Missouri, and this plea was accompanied by affidavit of petitioner stating the facts; and petitioner then and there claimed he was not answerable to the said district court of Travis county.

On June 24, 1888, thereafter, the then judge of the district court overruled this plea, and at the ensuing term of the court, on Oct. 6, 1888, a new judge being then on the bench, this plea was resubmitted, and at the same time your petitioner demanded a jury. Pending this second consideration of the plea to the jurisdiction, the State of Texas, by her att'y of record, filed a supplemental petition in response to petitioner's plea, in which it was alleged that petitioner in his contract having agreed in writing that money due by virtue of said contract was to be paid at the State treasury in Travis county, Texas, and having also agreed that any suit brought for the collection of said lease money could be instituted in Travis county district court, that petitioner had bound himself to submit to the jurisdiction of the district court. Your petitioner, by his attorneys, appearing only for that purpose, demurred to said supplemental petition and further specially excepted that, even if it were true, such agreement did not confer jurisdiction on Travis county district court.

On Nov. 3, 1888, the plea to the jurisdiction was again overruled, *and* the court below in effect holding that it would regard service held under and by virtue of said art. 1230 *et seq.* to be good, and further holding that by virtue of the agreements
41 above set out petitioner had bound himself to submit to the jurisdiction of Travis county district court. On Nov. 14th, 1888, when the case was regularly reached, petitioner, by his attorneys, waived the jury hitherto demanded and declined to answer further, and relying solely on his pleas to the jurisdiction; whereupon the court proceeded to hear the case as submitted by counsel for the State, and judgment was rendered against petitioner for the sum of $5,957.75, and from this judgment an appeal was duly perfected to the supreme court of Texas; and, the case having been regularly submitted, on ——, 1889, thereafter a judgment was rendered affirming the decision of the lower court, said judgment in effect holding, as is apparent from the opinion of the supreme court of Texas, on file and recorded in said court, that while under art. 1230 *et seq.*

no service could be had outside of the State of Texas in an action of a purely personal demand, and that a judgment obtained thereunder would be absolutely void, still the court held that under art. 1242 of the Revised Statutes of Texas, which provides that the filing of an answer shall constitute such an appearance of the defendant as to dispense with the necessity for the issuance of service of citation upon him, that by coming in and pleading to the jurisdiction of the court, even though appearing solely for that purpose, that such plea to the jurisdiction was, in the purview of said statute (art. 1242), such a voluntary appearance on the part of this petitioner as would give the district court of Travis county jurisdiction; and thus the judgment of the lower court was affirmed, though your petitioner in the lower court and by his assignments of error in the supreme court maintained that such service was in violation of the Constitution of the United States and the 14th amendment thereof, and was not such due process of law as was and is contemplated by the Constitution of U. S.; and thus by said decision did the supreme court of Texas in effect affirm the validity of the article 1230 *et seq.* of R. S. of Texas, though, as already stated, said court, while declaring said service of no effect, still, by its construction of art. 1242 of the Revised Statutes of Texas, in holding that even though petitioner appeared for the sole purpose of questioning the so-called service had on him, submitted himself to the jurisdiction of the district court of Travis county, by so holding made binding on this petitioner another and different State statute, equally repugnant to and in contravention of the rights guaranteed to this petitioner under and by virtue of the Constitution of the United States and the fourteenth amendment thereof; and subsequent to said affirmance of the judgment of the district court of Travis county, to wit, on — day of ——, 1869, this petitioner, appearing by counsel solely for that purpose, filed a motion for rehearing in the supreme court of Texas; which motion, amongst other grounds, had the following:

"7. Because the court in its opinion compels appellant, a non-resident defendant, to submit himself to the jurisdiction of the district court of Travis county by applying to and making binding on him a different State statute, to wit, Rev. Stat., art. 1242, when appellant has appeared only for the purpose of questioning the validity of Rev. Stat., article 1230 *et seq.*, said article 1242, as construed by this court, being as much in contravention of law and open to the same objections as article 1230 *et seq.*"—

So far as this cause is concerned; and which motion was, on — day of June, 1889, overruled and denied, and thereby said judgment became and is the final judgment of the highest court in the State of Texas; and, as is apparent from the record in said cause, which is number 6775 on the docket of said supreme court, at its Austin division, called in question the validity of the aforesaid statutes of Texas and of the judgment rendered thereunder on account of their being repugnant to the fourteenth amendment of the Constitution of the
United States, forbidding any State to deprive any person of
42 property without due process of law, and the supreme court
of Texas, by its said judgment of affirmance, sustained the
validity of said statutes of the State of Texas.

Wherefore your petitioner, F. B. York, seeking to set aside said judgment, prays for a writ of error to the Supreme Court of the United States for the correction and revision of the many errors manifest in the record, and *they* pray- for a citation in error to the State of Texas, the same to be served on her attorney general, J. S. Hogg, who may be found at Austin, Travis county, Texas.

WEST & McGOWN,
Attorneys for Plaintiff in Error, F. B. York.

Allowance of Writ of Error.

The writ of error as within prayed for is allowed.

JOHN W. STAYTON,
Chief Justice Supreme Court, State of Texas.

Endorsed: F. B. York, plaintiff in error, *vs.* The State of Texas, defendant in error. Petition for writ of error. Filed in supreme court of Texas, at Austin, August 15th, 1889. Chas. S. Morse, clerk.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the above and foregoing two (2) pages contain a true and correct copy of the original "petition for writ of error" in cause No. 6775, entitled F. B. York, plaintiff in error, *vs.* The State of Texas, defendant in error, now on file in my office.

Seal Supreme Court of the State of Texas.

Witness my hand and the seal of said court this the 28th day of August, A. D. 1889.

CHAS. S. MORSE, *Clerk, &c.*

43 THE UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court, before you or some of you, being the highest court of law or equity of the State of Texas in which a decission could be had in the said suit between the plaintiff in error, F. B. York, and the defendant in error, The State of Texas, wherein was drawn in question the construction of certain articles of the Constitution of the United States and the decision was against the right, title, and privilege claimed under said Constitution, a manifest error hath happened, to the great damage of the said F. B. York, plaintiff in error, as by *their* complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then and there, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of

America, together with this writ, so that you have the same at
Washington on the 2d Monday of October next, in said Su-
43½ preme Court, then and there —, that, the records and pro-
ceedings aforesaid being inspected, the said Supreme Court
may cause further to be done therein to correct that error what
of right and according to the laws and customs of the United States
should be done.

Witness the Honorable Melville W. Fuller, Cheif Justice of the said Supreme Court, the 27th day of July, 1889.

[The Seal of the U. S. Circuit Court, Western Dist. Texas.]

(Attest:) D. H. HART,
Clerk U. S. Circuit C't, W. Dist. Texas, 5th Circuit, Austin.

Allowed this the 24th day of July, A. D. 1889.

JOHN W. STAYTON,
Cheif Justice Sup. C't of State of Texas.

[Endorsed:] #6775. F. B. York, pl'ff in error, *vs.* State of Texas, def't in error. Writ of error. Filed in supreme court of Texas, at Austin, August 15th, 1889. Chas. S. Morse, clerk.

44 *Notice & Waiver to Maddox & Anderson.*

In Supreme Court of the State of Texas.

F. B. YORK, Appellant,
vs.
STATE OF TEXAS, Appellee.
} No. 6775. Appeal from the District Court of Travis County.

To Jno. W. Maddox and Chas. E. Anderson, residents of Austin, Travis county, Texas.

GENTLEMEN: The supreme court of Texas, on — day of ——, 1889, affirmed the judgment of the court below in the above-styled case against F. B. York as appellant and against you as the sureties on his appeal bond; and afterwards, on the — day of ——, 1889, said supreme court of Texas overruled the motion of appellant for a rehearing therein, and you are now hereby notified that the said F. B. York desires to prosecute a writ of error from said judgment to the Supreme Court of the United States from the supreme court of the State of Texas, and you are all hereby requested by him to join in said writ of error.

F. B. YORK, *Appellant,*
By WEST & McGOWN,
His Attorneys.

Refusal to Join in Writ of Error.

AUSTIN, TEXAS, *July* —, 1889.

We hereby acknowledge service of the foregoing notice, but most respectfully decline and refuse to join the said F. B. York in a writ of error from the judgment mentioned in said notice.

JNO. W. MADDOX.
C. E. ANDERSON.

Endorsed: No. 6775. F. B. York, appellant, *vs.* The State of Texas, appellee. Notice and waiver. Filed in supreme court of Texas, at Austin, August 16th, 1889. Chas. S. Morse, clerk.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the above is a true and correct copy of the original "notice and waiver" now on file in my office.

Seal Supreme Court of the State of Texas.

Witness my hand and the seal of said court this the 28th day of August, A. D. 1889.

CHAS. S. MORSE, *Clerk, &c.*

45 United States of America to the State of Texas, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States, to be holden in Washington, D. C., on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Texas, wherein F. B. York is plaintiff in error and The State of Texas is defendant in error, and then show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

JOHN W. STAYTON,
Chief Justice S'p. C't, State of Tex.

I hereby acknowledge due service of this citation and the receipt of a true copy of the same this the 29 day of Aug., A. D. 1889, for 2nd Monday in Oct.

J. S. HOGG, *Att'y Gen'l.*

[Endorsed:] No. 6775. F. B. York, pl'ff in error, *vs.* State of Texas, def't in error. Citation in error. Filed in supreme court of Texas, at Austin, August 16th, 1889. Chas. S. Morse, clerk, &c.

46 *Bond for Writ of Error.*

In the Supreme Court of the United States.

F. B. YORK, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.
} Writ of Error from the Supreme Court of Texas.

Know all men by these presents that we, F. B. York, as principal, and F. M. Maddox, Jno. W. Maddox, and C. E. Anderson & J. W. Lawrence, as sureties, are held and firmly bound unto the State of Texas in the full and just sum of seven hundred and fifty dollars ($750.00); for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, conditioned, however, that whereas lately, to wit, on 7 day of May, A. D. 1889, in the supreme court of the State of Texas, in a suit pending in said court between F. B. York, as appellant, and The State of Texas, as appellee, said cause being numbered 6775 on the docket of the Austin division of the supreme court of Texas, said cause being an appeal from the district court of Travis county, judgment was rendered against appellant, F. B. York, as principal, and likewise against Jno. W. Maddox and C. E. Anderson, as sureties, on the appeal bond of said F. B. York for all costs, the judgment of the Travis county district court against said F. B. York being in all things affirmed, and the said F. B. York having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Texas, citing and admonishing the said State of Texas to be and appear at a Supreme Court of the United States to be holden at Washington, in the District of Columbia, the second Monday in October next:

Now, the condition of the above obligation is such that if the said F. B. York shall prosecute the said writ of error to effect and answer all costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and effect.

Witness our hands and seals this the — day of ——, A. D. 1889.

F. B. YORK,
By WEST & McGOWN, *Att'ys.*
F. M. MADDOX.
JNO. W. MADDOX.
C. E. ANDERSON.
J. W. LAWRENCE.

THE STATE OF TEXAS, *County of Travis:*

I, Jas. P. Hart, the undersigned authority, do hereby certify that I am well acquainted with —— —— and —— ——, the sureties on the foregoing bond, and that they are solvent and own in their own right property subject to execution many times exceeding seven hundred and fifty dollars above all debts and liabilities, and, furthermore, that if in my official capacity said bond was presented to me for my approval that I would approve same.

[SEAL.] Given under my hand and seal of office this 22nd day of July, A. D. 1889.

JAS. P. HART,
Clerk Dist. Court, Travis Co., Texas.

Endorsed: No. 6775. F. B. York, plaintiff in error, *vs.* The State of Texas, defendant in error. Bond for writ of error. Filed in supreme court of Texas, at Austin, August 15th, 1889. Chas. S. Morse, clerk.

47 CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the foregoing one page contains a true and correct copy of the original "cost bond for writ of error" in cause No. 6775, entitled F. B. York, plaintiff in error, *vs.* The State of Texas, defendant in error, now on file in my office.

Witness my hand and the seal of said court this the 28th day of August, A. D. 1889.

[Seal Supreme Court of the State of Texas.]

CHAS. S. MORSE, *Clerk, &c.*

48 *Assignment of Errors.*

In the Supreme Court of the United States.

F. B. YORK, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

And now comes the plaintiff, F. B. York, and makes the following specifications of error committed by the supreme court of Texas in the decision of this cause:

First. F. B. York, being a citizen and resident of the State of Missouri, the district court of Travis county, Texas, in a suit on a purely monied demand, had no jurisdiction over his person, although he had been served in the State of Missouri, as required by Texas Revised Statutes, arts. 1230 *et seq.*, said so-called process, by virtue of said articles, being in contravention of the Constitution of the United States and the fourteenth amendment thereof.

Second. F. B. York, a citizen and resident of the State of Missouri, having appeared in response to the so-called service had on him in the district court of Travis county under protest and for the sole purpose of pleading to the jurisdiction of the district court of Travis county, his plea to the jurisdiction made under such circumstances does not, in contemplation of Rev. Stat. of Tex., art. 1242, constitute such an appearance in said court as would give same jurisdiction over him, and the construction thus put on said art. 1242 by the supreme court of Texas is a forced and unnatural construction and makes binding on a citizen and resident of another State an act which is in itself in contravention of the rights guaranteed by the Constitution of the United States to the citizen, and said construction of said art. 1242 by the supreme court of Texas in holding that such plea is an appearance of the defendant who thereby submits himself to the jurisdiction of the court is in contravention of 14th amendment of Const. of U. S.

Third. Art. 1230 of the Revised Statutes of Texas, providing that service upon defendants without the State of Texas may be had by notice served upon them by any person competent to make affidavit and authorizing personal judgment against such non-resident defendant, is repugnant to the fourteenth amendment to the Constitution of the United States.

Fourth. Art. 1242 of the Revised Statutes of Texas, providing that the filing of an answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance or service of process on him as construed by the supreme court of Texas in this cause, holding that where the defendant appears *in limine* for the sole purpose of questioning the jurisdiction of the court such plea constitutes such a voluntary appearance within the purview of that statute, is in direct contravention of the Constitution of the United States and the 14th amendment thereof and is repugnant to the same, as it thereby confers jurisdiction on the courts of Texas on citizens of other States, and the judgment of the lower court affirmed by the supreme court based on service under arts. 1230 *et seq.* and the construction given to art. 1242 is an absolute nullity.

Fifth. The supreme court of Texas in calling to the aid of
49 the judgment of the district court based on service had under
art. 1230 of Rev. Statutes of Texas, and in attempting to sustain said judgment by applying another and a different statute of Texas, to wit, R. S., art. 1242, so construed said statutes, and especially art. 1242, as to deprive this plaintiff in error, F. B. York, of the rights guaranteed him by the Constitution of the United States and the fourteenth amendment thereof.

Sixth. The supreme court of Texas in giving to R. S. of Texas, art. 1242, the force of a jurisdictional statute confers the very jurisdiction which in its opinion says cannot be done by R. S. of Texas, art. 1230 *et seq.*, and thus seeks to make binding on a non-resident a statute which thus construed is equally repugnant to the 14th amendment of the constitution of Texas and can have no more binding effect than R. S. of Texas, arts. 1230 *et seq.*

Wherefore, by reason of the above errors, should this cause be reversed and dismissed.

WEST & McGOWN,
Att'ys for Pl'ff in Error, F. B. York.

Endorsed: F. B. York, plaintiff in error, *vs.* The State of Texas, defendant in error. Assignment of errors. Filed in supreme court of Texas, at Austin, August 15th, 1889. Chas. S. Morse, cl'k, &c.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the above and foregoing one page contains a true and correct copy of the original "assignment of errors" in cause #6775, entitled F. B. York, plaintiff in error, *vs.* The State of Texas, defendant in error, now on file in my office.

Witness my hand and the seal of said court this the 28th day of August, A. D. 1889.

[Seal Supreme Court of the State of Texas.]

CHAS. S. MORSE, *Clerk, &c.*

See general certificate on next page.

50 CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the foregoing forty-nine (49) pages contain a true and correct copy of all the proceedings had in cause No. 6775, entitled F. B. York, appellant, *vs.* The State of Texas, appellee, as the same appears from the records and papers pertaining to said cause now on file in my office.

Witness my hand and the seal of said court this the 10th day of October, A. D. 1889.

[Seal Supreme Court of the State of Texas.]

CHAS. S. MORSE, *Clerk, &c.*

Endorsed on cover: Texas supreme court. No. 1412. F. B. York, plaintiff in error, *vs.* The State of Texas. Filed October 18, 1889.

Office Supreme Court U. S.
FILED.
MAY 5 1890
JAMES H. McKENNEY
CLERK.

In Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1412.

F. B. YORK, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Texas.

Brief and Argument of F. B. York, Plaintiff in Error, for Submission under Rule 20 of this Court.

RUFUS H. THAYER,
Of Counsel for Plaintiff in Error, F. B. York.

Southgate & Son, Austin, Texas.

In Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1412.

F. B. YORK, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Texas.

Brief and Argument of F. B. York, Plaintiff in Error, for Submission under Rule 20 of this Court.

STATEMENT:

On the 20th day of October, 1885, the State of Texas, through its State Land Board, leased to the plaintiff in error, F. B. York, for the term of six years, eighty-seven (87) sections of land, each containing 640 acres, situated in Lipscomb county, Texas, at the rate of six cents per annum per acre, it being stipulated in said lease contract, which was executed in duplicate, that the lessee, York, should pay to the Treasurer of the State of Texas, at Austin, Travis county, Texas, annually the amount due by virtue of the lease. (Rec. pp. 2–7.)

On February 15, 1888, the State of Texas instituted this suit in the District Court of Travis county, in the State of Texas, against plaintiff in error to recover certain lease moneys due by virtue of this lease contract. On March 9th thereafter, the plaintiff in error filed his special plea to the jurisdiction questioning the sufficiency of the service had upon him in St. Louis, Mo., and claiming to be a resident citizen of the city of St. Louis, in the State of Missouri, and as such not amenable to the courts of the State of Texas in a purely personal action where service was had on him as had been done in this case. Service was had on York by sending a copy of the petition and a notice to serve non-residents to a credible party who delivered the same in person to York in St. Louis, Missouri. (Rec. pp. 7–8). The service was made in accordance with the Revised Statutes of Texas, Arts. 1230 *et seq.*, and as such was duly served. On June 24, 1888, the then judge of the District Court of Travis county over-ruled the plea to the jurisdiction and at the ensuing term of the court on October 6, 1888, a new judge being then on the bench, this plea was re-submitted.

Pending this second consideration of the plea to the jurisdiction, the State of Texas by her attorneys of record filed a supplemental plea, in which it was alleged that York having agreed in writing that money due by virtue of the lease contract was to be paid at the State Treasury, in Travis county, Texas, and having also agreed that any suit brought for the collection of said lease money could be instituted in the Travis County District Court, that by so agreeing, York had bound himself to submit to the jurisdiction of the Travis County District Court. York by his attorneys appearing, only for that purpose, demurred to this supplemental petition and further specially excepted, that even if it were true, such agreement did not confer jurisdiction on the Travis County District Court. (Rec. pp. 9–10.)

On November 3, 1888, the plea to the jurisdiction was again over-ruled, the District Court in effect holding that it would regard service had under and by virtue of Arts. 1230 *et seq.* of Revised Statutes of Texas to be good; and further holding, that under and by virtue of the agreements made in the lease and set out in the supplemental petition, plaintiff in error had bound himself to submit to the jurisdiction of the Travis County District Court. On November 14, 1888, when the case was regularly reached, plaintiff in error declined to answer further, whereupon the court proceeded to hear the case, as submitted by counsel for the State, and judgment was rendered against plaintiff in error for the sum of $5957.75, and from this judgment an appeal was duly perfected to the Supreme Court of Texas.

On May 7, 1889, a judgment was rendered in the Supreme Court affirming the decision of the District Court of Travis county. This judgment as appears from the opinion of the Supreme Court of Texas, which is a part of the record in this cause (Rec. pp. 20 to 24), in effect, holds, that while under Arts. 1230 *et seq.* of the Revised Statutes of Texas, no service could be had outside of the State of Texas in an action on a demand of a character purely personal, and that a judgment obtained thereunder would be absolutely void, yet the Supreme Court further held, that under Art. 1242 of the Revised Statutes of Texas, which provides that the filing of an answer, shall constitute such an appearance of the defendant, as to dispense with the necessity for the issuance of citation to be served on defendant, that by coming in and pleading to the jurisdiction of the court, even though appearing solely for that purpose, that such plea to the jurisdiction was in the purview of said statute (Art. 1242), such a voluntary appearance on the part of plaintiff in error as would give the District Court of Travis county jurisdiction. From the judgment of the Supreme Court of Texas, in thus affirming the judgment of the District Court of Travis county the plaintiff in error having perfected his writ of error brings this cause before this court for revision.

Assignment of Errors:

For the purposes of the proper presentation of this cause we will consider the first and third assignments of error together, since they in effect raise the same question. These assignments of error are as follows:

First Assignment of Error:

F. B. York being a citizen and resident of the State of Missouri, the District Court of Travis county, Texas, in a suit on a purely personal demand has no jurisdiction over his person, although he had been served in the State of Missouri, as required by Texas Revised Statutes, Arts. 1230 *et seq.*, said so-called process by virtue of said articles, being in contravention of the Constitution of the United States and the fourteenth amendment thereof.

Third Assignment of Error:

Art. 1230 of the Revised Statutes of Texas providing that service upon defendants without the State of Texas may be had by notice served upon them by any person competent to make affidavit and authorizing personal judgment against such nonresident defendants, is repugnant to the fourteenth amendment of the Constitution of the United States.

The two assignments of error are in themselves propositions, and in effect claim, that the District Court of Travis county, Texas, had no jurisdiction over the plaintiff in error by reason of the pretended service had on him in St. Louis, Mo., being a resident citizen of Missouri.

STATEMENT:

York was a resident and citizen of the State of Missouri at the time and long prior to the institution of this suit. (York's affidavit, Rec. p. 9; Findings of the Travis County District Court, Rec. p. 13). Service was had on York by sending a copy of petition and notice to a credible party, who delivered the same in person to York in St. Louis, Mo. This so-called service was made in contemplation of the Revised Statutes of Texas, Arts. 1230 *et seq.*, which are as follows:

ART. 1230. *Notice to Defendants without the State.*—Where the defendant is absent from the State, or is a non-resident of the State, the clerk shall, upon the application of any party to the suit, his agent or attorney address a notice to the defendant requiring him to appear and answer the plaintiff's petition at the time and place of the holding of the court, naming such time and place. Its style shall be "The State of Texas," and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties, and the nature of the plaintiff's demand, and shall state that a copy of the plaintiff's petition accompanies the notice. It shall be dated and signed and attested by the clerk, with the seal of the court impressed thereon, and the date of its issuance shall be noted thereon; a certified copy of the plaintiff's petition shall accompany the notice.

ART. 1231. *By Whom Served.*—Such notice may be served by any disinterested person competent to make oath of the fact.

ART. 1232. *Service in such Cases.*—Service in such cases shall be made by the person executing the same, delivering to the defendant in person, a true copy of such notice together with the certified copy of the plaintiff's petition accompanying same.

ART. 1233. *Return of such Service.*—The return of service in such cases shall be indorsed or attached to the original notice: it shall state when the same was served, and the manner of service, and shall be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits; and such affidavit shall be certified under the hand and official seal of such officer.

ART. 1234. *Effect of such Service.* — Where a defendant has been served with such notice, he shall be required to appear and answer in the same manner and under the same penalties as if he had been personally served with citation within this State.

[NOTE.—See also Act of March 15, 1875; June 13, 1875, Sec. 2, 14th Leg. S. S., p. 170; Sayles' Revision of the Texas Statutes, Vol. 1, p. 418]. The service had on York will be found at page 7 of the record and is in substantial compliance with these statutes.

Argument on these two Assignments of Error:

The propositions of law, based on the foregoing assignments are too well settled by this court in numerous decisions to need from us any argument, and we will content ourselves merely with quoting from the opinion of the Supreme Court of Texas in the case at bar as to this point. That court, through its Chief Justice, says:

"Since the decision made in the case of Pennoyer vs. Neff (95 U. S. 723), it must be held that service made without this State, as it was upon appellant, is not sufficient to confer jurisdiction on a court of this State to render a mere personal judgment against one, a citizen of and resident in another state. (Freeman vs. Alderson, 119 U. S. 185; Hart vs. Sansum, 110 U. S. 151; Harkness vs. Hyde, 98 U. S. 476; Cooper vs. Reynolds, 10 Wall., 309.")

"One of the grounds on which the decision in Pennoyer vs. Neff is based, makes it authoritative throughout all the Union in all cases to which it is applicable, and although there may have been some decisions made in this State asserting a contrary rule, we feel bound to follow it." (Rec. p. 20.)

The Supreme Court of Texas, however, does not stop here as we contend the court should have done, and enter a judgment reversing and dismissing this cause for want of jurisdiction, but it goes further, and while it says "that a judgment entered against York before his filing his plea to the jurisdiction would have been a nullity (Rec. p. 22), the court says, that by appearing for that purpose even though "the record before us leaves no ground for claim, that appellant intended voluntarily to submit himself to the jurisdiction of the court, which from first to last he resisted," he thereby submitted to the jurisdiction of the Travis County District Court. And this leads us to the discussion of the main question of this appeal, which is embraced in the second, fourth, fifth and sixth assignments of error, which will be considered together and are as follows :

Second Assignment of Error:

F. B. York, a citizen and resident of the State of Missouri, having appeared in response to the so-called service had on him in the District Court of Travis county, under protest and for the sole purpose of pleading to the jurisdiction of the District Court of Travis county, his plea to the jurisdiction, under such circumstances does not, in contemplation of the Revised Statutes of Texas, Art. 1242, constitute such an appearance in said court, as would give same jurisdiction over him, and the construction thus put upon said Art. 1242, by the Supreme Court of Texas, is a forced and unnatural construction, and makes binding on a citizen and resident of another state, an act which is in itself in contravention of the rights guaranteed by the Constitution of the United States to the citizen, and said construction of said Art. 1242 by the Supreme Court of Texas in holding that such plea is an appearance of the defendant, who thereby submits himself to the jurisdiction of the court, is in contravention of the fourteenth amendment of the Constitution of the United States.

Fourth Assignment of Error:

Art. 1242 of the Revised Statutes of Texas, providing that the filing of an answer, should constitute an appearance of the defendant, so as to dispense with the necessity of the issuance or service of process on him, as construed by the Supreme Court of Texas in this cause, holding that where the defendant appears *in limine* for the sole purpose of questioning the jurisdiction of the court, such plea constitutes such a voluntary appearance within the purview of the statute, is in direct contravention of the Constitution of the United States and the Fourteenth Amendment thereof, and is repugnant to the same as it thereby confers jurisdiction on the courts of Texas on citizens of other states, and the judgment of the lower court affirmed by the Supreme Court based on service under Arts. 1230 *et seq.* and the construction given to Art. 1242 is an absolute nullity.

Fifth Assignment of Error:

The Supreme Court of Texas in calling to the aid of the judgment of the District Court, based on service had under Art. 1230 of the Revised Statutes of Texas and in attempting to sustain said judgment by applying another and a different statute of Texas, to-wit, Revised Statute, Art. 1242, so construed said statutes and especially Art. 1242, as to deprive the plaintiff in error, F. B. York, of the rights guaranteed him by the Constitution of the United States and the Fourteenth Amendment thereof.

Sixth Assignment of Error:

The Supreme Court of Texas in giving to the Revised Statute of Texas, Art. 1242, the force of a jurisdictional statute, confers the very jurisdiction, which in its opinion says can not be done by Revised Statute of Texas, Art. 1230 *et seq.*, and thus seeks to make binding on a non-resident, a statute which thus construed, is equally repugnant to the Constitution of the United States, and can have no more binding effect than Revised Statute of Texas, Arts. 1230 *et seq.*

The above assignments of error, which are in themselves propositions, clearly and fully bring to the mind of the court the views entertained by counsel for plaintiff in error. At the risk of being tedious, but with the single desire of showing how erroneous is the opinion of the Supreme Court, we will consider them briefly and in connection with the following propositions, which are in fact but re-statements of the law as contended for in our assignments of error.

Proposition One.

The appearance of plaintiff in error in response to the notice served on him, and under protest for the sole purpose of questioning the jurisdiction of the District Court of Travis county, in no sense bound him to submit to the jurisdiction of that court.

Proposition Two.

The appearance of plaintiff in error under protest solely for the purpose of questioning the jurisdiction of the District Court even in contemplation of Art. 1242 of the Revised Statutes of Texas, was not such a voluntary appearance, nor was his plea such an answer, as to make him subservient to the jurisdiction of the Travis County District Court.

Statement in Support of These Two Propositions:

Plaintiff in error filed the following plea:

"STATE OF TEXAS,
vs. } No. 8554.
"F. B. YORK.

"Suit pending in the District Court of Travis County.
"To March Term, 1888.

"Now at this day and time comes F. B. York, defendant "herein and saving unto himself all manner of defense, by de-"murrer, exception, plea or otherwise, and in no wise admitting "the jurisdiction of this Honorable Court to hear and determine "this suit, now here submits the following plea specially to the "Court." Then follows the plea, which sets up the fact that being a citizen of Missouri, that the service had on him in Missouri, was not in accordance with law, and that not being a resident of the State of Texas, the court was without jurisdiction. (Rec. pp. 8–9). No other answer was ever filed, and the plaintiff in error refusing to answer further, the judgment was rendered in favor of the State of Texas, which judgment recited the fact that the plaintiff declined to answer but relied on his plea to the jurisdiction. (Rec. pp. 15–16). From the conclusions of law and fact filed by the trial judge (Rec. pp. 11–16), as well as the pleadings, it will be seen that no question of appearance was raised, nor is anything to be found in the record relating to same, until the opinion of the Supreme Court (Rec. pp. 20–24) wherein it is in effect held by that court, that the plea to the jurisdiction filed by plaintiff in error was such an answer, that in contemplation of the Revised Statutes and particularly Art. 1242 of same, as gave the District Court jurisdiction.

ART. 1242. Revised Statutes of Texas, is as follows: The filing of an answer shall constitute such an appearance of the defendant, so as to dispense with the necessity for the issuance or service of citation upon him.

ART. 1243. Where the citation or service thereof is quashed on motion of the defendant, the case may be continued for the term, but the defendant shall be deemed to have entered his appearance to the succeeding term of the court.

ART. 1245. No judgment shall in any case be rendered against any defendant unless upon service or acceptance or waiver of process or upon appearance by the defendant as prescribed in this chapter, except where otherwise expressly provided by law. (NOTE.—See Act May 3, 1846; June 26, 1846, Secs. 12–13, 1st Leg. (Texas) p. 363; Paschal Digest of Laws of Texas, Arts. 1508 and 1432; Sayles Revision of Texas Statutes, Vol. 1, pp. 419 and 420.)

Authorities in Support of the above Propositions:

Harkness vs. Hyde, 98 U. S. 476;

Bank vs. Slocum, 14 Pet., 60;

Racquet vs. Nixon, Dallam (Tex.), 386;

DeWitt vs. Monroe, 20 Tex., 289;

Haygood vs. Dial, 43 Tex., 625 ;

Robertson vs. Schmidt, 48 Tex., 19 ;

Ins. Co. vs. Fitzgerald, White & Wilson (Tex.) page 785 ;

U. S. vs. Yates, 6 How. (U. S.), 605 ;

Decker vs. Belting Co., 11 Blatch., U. S. Cir. Ct., 76 ;

Pomeroy vs. N. Y. & N. H. R. Co., 4 Blatch., 120 ;

Day vs. Newark Pub. Co., 1 Blatch., 628 ;

Parrott vs. Ala. Life Ins. Co., 4 Wood (U. S. Cir. Ct. Rep., 355 ;

Cunningham vs. Geolet, 4 Denio (N. Y.), 72 ;

Whelock vs. Lee, 74 N. Y., 495 ;

Sullivan vs. Frazee, 4 Robt. (N. Y.), 616 ;

McNabb vs. Bennett, 66 Ills., 158 ;

Aultman vs. Stevenson, 8 Neb., 109 ;

Wright vs. Boynton, 37 N. H., 18 ;

Beumer vs. Chapman, 11 Kan., 121 ;

Wyson vs. Wyatt, 11 Leigh (Va.), 584 ;

Cooper vs. Smith, 25 Iowa, 269 ;

Hawes on Jurisdiction, Sec. 19 ;

Am. and Eng. Encyclopedia of Law, Subtitle, Appearance, Vol. 1, pp. 182 and 183.

Argument in Support of Preceding Propositions :

In the case of Harkness vs. Hyde, 98 U. S. 479, cited *Supra*, this court in considering what is an appearance uses the following pertinent language, Mr. Justice Field delivering the opinion of the court :

"The right of the defendant to insist upon the objection to the illegality of service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground, or what we consider as intended that the service be set aside ; nor when that motion was overruled by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained, is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity, nor is the objection waived, when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further pleadings without contestation. It is only when he pleads to the merits in the first instance, without insisting upon the illegality that the objection is deemed to be waived."

Says Justice Stayton in his opinion in this case, (Rec., p. 21.):

"The record before us, however, leaves no ground for claim, that appellant intended voluntarily to submit himself to the jurisdiction of the court, which from first to last he resisted."

Says Judge Bronson, in the case of Cunningham vs. Geolet, 4 Denio (N. Y.), 72, cited *Supra:*

"It is said that Cunningham waived all objections to the affidavit and summons by appearing. He did not appear for any other purpose, than that of objecting to the sufficiency of the proceedings; and it would be *strange* indeed if that could be construed into a waiver of the very objections which he took."

Likewise says Judge Valentine, in the case of Beamer vs. Chapman, 11 Kan., 121, cited *Supra:*

"A special appearance to contest the jurisdiction of the court does not give the court jurisdiction."

A brief reference to the most important decisions of the Supreme Court of Texas on this question will show that at least up to the time of the opinion in the present case, the rule as stated in our propositions has uniformly been recognized by the Supreme Court of Texas.

In the early case of Racquet vs. Nixon, Dallam 388, Judge Hemphill in discussing what constitutes an appearance says:

"Constructive or even actual notice of suit will not do, unless given in the manner prescribed by law; but the defect of the want of a citation will be cured by appearance and pleading to the merits. Was the motion of the defendant to dissolve the attachment on account of the insufficiency of the affidavit and petition, such a plea to the merits, as cured the want of a citation? It does not so appear to this court. A motion to dissolve an attachment is in the nature of a plea in abatement. From its nature, it requires to be pleaded *in limine litis*, or before issue is joined on the merits, and therefore repels the idea that in itself it constitutes a pleading to the merits of the case. There is nothing then in a motion of that character which would preclude the defendant from having the attachment dismissed for want of a citation. He has waived no right."

Likewise in DeWitt vs. Monroe, 20 Texas, 289, Judge Roberts in discussing this question, says:

"An appearance for the purpose of objecting to defective process or want of process has often been held by this court to be permissible, and that it does not bind the party to a full appearance in the cause."

And the same effect are the cases of Haygood vs. Dial, 43 Tex., 625, and Robertson vs. Schmidt, 48 Tex., 19.

Now the learned justice who renders the opinion in this cause, seems to concede that such was the rule in Texas prior to the adoption of the Revised Statutes, but in a very ingenious manner, he concludes after citing Arts. 1242, 1243 and 1244 of the Revised Statutes of Texas, after stating that an answer consists of *all* the defensive pleadings, after houlding that a plea to the jurisdiction is therefore an answer, he invokes especially Art. 1242 of Revised Statutes cited *supra*, which says that the filing of an answer by the defendant shall constitute such an appearance as no longer to make necessary the issuance of a citation, he concludes, therefore, that the plaintiff in error has voluntarily appeared, and therefore affirms the judgment. To put the opinion in a nutshell, and silogistically and logically it is: York, a citizen of Missouri, files under protest a plea to the jurisdiction, questioning the right to be served outside of Missouri by Texas process, which plea itself constitutes an answer, says the court, and therefore under the Texas law he has appeared and can not question the jurisdiction of the *nisi prius* court. In other words, we have the very anomalous rule in Texas, that he who under protest comes into court to question its jurisdiction, by that very act submits himself to its jurisdiction. Then what a dilema is a citizen placed in by this novel position? If he appears he submits to the jurisdiction of the Texas courts. If he fails to appear, and afterwards sues out a writ of error and a reversal is had, he submits to the jurisdiction of the Texas court under Art. 1244 of the Revised Statutes of Texas. If he fails to appear at all and cares not to sue out a writ of error and his property in Texas is levied on to satisfy this personal judgment, he must perforce permit same to be sold and institute a suit for the recovery and thus be subjected again to the judgment in the original action and often times, be at no little trouble and expense; or if he enjoins the execution, under the blended system of law and equity in vogue in the Texas courts, he thereby submits himself to the jurisdiction of the court, and this too while the forum of his own state is open to the plaintiff to prosecute his claim. Nor can he in an action like the case at bar, remove the suit to the Federal Court, the State not being a citizen in the eye of the law. (Ins. Co. vs. Wisconsin, 122 U. S. 473.)

Again, to what strange results does this opinion lead? It utterly abrogates all pleas of privilege, and pleas to the jurisdiction, for the defendant, who sets them up, has "answered," has appeared, and he can no longer say to that court into which the plaintiff has brought him unwillingly and may hap for some sinister purpose "I desire to be tried in my own county, in my own domicile, in my own State." It seems to us that a valuable right is by this construction of the statute filched from the defendant, and particularly one which under no law can be taken from a defendant, who is not a citizen of Texas.

Nor can we agree with the learned judge in the conclusion that Art. 1242 of the Revised Statutes changed the law of Texas from what it was as laid down in the cases above cited before the Revised Statutes went into effect. A careful examination of the report of the Commissioners to revise the Statutes of Texas which report, so far as it is pertinent to this case, is to be found in Vol. 2 of Sayles Revision of the Texas Statutes, pp. 722–723, will show that at least in the minds of the Commissioners, no such sweeping change was intended, for in their report, they fail to show anywhere that the old law was in any way repealed, changed or modified, though the purpose of the report was to show this very fact. We are further borne out in this conclusion by the Revised Statutei themselves, for Art. 1262 says: "The defendant in his answer may plead as many several matters whether of law or fact as he shall think necessary for his defense and which may be pertinent to the cause provided that he shall file them all in due order of pleading." (Act May 13, 1846; June 22, 1846, Sec. 29, 1st Leg. h. 363; Pas. Dig., 1441; Sayles Revised Statutes of Texas, Vol. 1, p. 424). And the Supreme Court of Texas the body which under the law (Art. 5, Sec. 25, Texas Constitution, and Art. 1014, Revised Statutes of Texas, Vol. 1, p. 333 of Sayles Revision), prescribes the rules of practice has laid down the following, among other rules, for the District Court:

> RULE 7. *Requisites of the Original Answer.*—The original answer may consist of pleas to the jurisdiction, an abatement, of privilege or any other dilatory pleas; * * *, the same being pleaded in the due order of pleading as required by Statute. * * (See 47 Texas Report: Sayles Revision of Texas Statutes, Appendix p. 1, Vol. 1.)

Article 1014 reads as follows:

> "The Supreme Court shall have power to make rules and regulations for the government of said court and other courts of the State, to regulate proceedings and expedite the dispatch of business therein."

From these references it seems to us there can be no question, but that a proper and liberal construction of Art. 1242 would show it to mean by the word answer, such pleading to the merits, as contradistinguished from a dilatory plea of the character of pleading to the jurisdiction, as precluded any necessity for service of process; and certainly that pleading should not be construed into an appearance and waiver of service, which in its very self questions the service, as not being due process of law and raises the right of the court in which the suit is pending to proceed further therein. It seems to us that a fair and unwarped construction of this article, when taken into consideration with Arts. 1262 and Art. 1014 of the Revised Statutes of Texas, Sec. 25, Art. 5 of the Constitution of Texas, and Rule 7 of the District Court, leaves no doubt of the right *in limine* for a defendant to plead to the jurisdiction, and by so pleading he has not entered a voluntary appearance.

Says the learned Judge: "His (York's) appearance was optional," "not a compulsory appearance," one made "in the exercise of his own untrammelled volition." Was the appearance a voluntary one? We think not. Was it not in response to a notice served on the defendant, a notice garbed in all the form of process? A notice which said in effect, if you do not appear to defend this cause, you refuse so to do at your own risk. Can an appearance in this manner be termed voluntary? if so, then every appearance under protest is a voluntary one. Voluntary, means of one's own accord, and not at the command or behest of a notice which begins:

"*The State of Texas to F. B. York—Greeting:*

"*These are therefore to require you to appear,*" *Etc., Etc.*

The Supreme Court says that this form of procedure was a mere nullity, that it was not binding on York, and yet it was what the Legislature of the State of Texas had declared to be of such force, as to make a judgment binding on the defendant served with such process. A process which, if Judge Townes is correct, and there can be no question of the force of his position, that when this case was presented to him, there had been no authoritative ruling on this subject by the Supreme Court of Texas in any other way except to hold such service good. (Rec. p. 15). And yet, with the law in force in Texas and recognized and upheld by her highest court, York is told that he should stay out of court, disregard this summons under seal of court, permit a judgment to be entered against him, his property seized and sold; for if he comes in to question the validity of such a proceeding at its very inception, he submits to the jurisdiction. Is this fair? Is this law? Is this the proper construction of the statute, the one in the lights before us, the report of the Commissioners to revise the statutes, the Texas Legislature intended should be given Art. 1242?

In this connection, we desire further to call the attention of the court to the fact, that this view of the statute in the opinion of the Supreme Court, if inference is worth anything, was certainly not in the mind of the other Texas Courts, who have had occasion to pass on this question of what constitutes an appearance since the revising of the Texas Statutes.

Jnstice McCormick, of the Northern District of Texas, in passing on a question similar to the one raised in this case, held in the case of Parrott vs. Alabama Gold Life Insurance Co., 4 Wood (U. S. Cir. Ct., 5th Cir.) Rep., p. 352; that a defendant to a suit, in a state court, who moves to quash the service of process upon him, and petitions for the removal of the cause to a court of the United States, and upon such removal renews his motion to quash, does not thereby enter an appearance by which the service of process is made unnecessary. And at this point counsel wish to call the attention of the court to the fact, that the plea presented to the lower court is more than a mere motion as might seem was its purpose from the opinion of the Supreme Court. York had been alleged to be a citizen of Texas, and had been served in Missouri. He responds solely for the purpose of denying the jurisdiction of the lower court further to proceed. His answer is more than a mere motion to quash the service, for had it been only this he perhaps would have been in court for the next term. (Revised Statutes, Art. 1243). His plea goes to the very gist of the right of the court to hear the cause, in the same manner, as he would under certain circumstances have the right to set up the privilege of being sued in his own county. His plea goes to the heart of the action, and call it what you may, if it was sustained so far as the *nisi prius* court, was concerned that was an end to the action in its forum.

The case of the P. & A. Life Insurance Co. vs. Fitzgerald *et ux.* decided by presiding Justice Walker of the Commissioners of Appeals of Texas and reported in White & Wilson Condensed Reports, pp. 784 *et seq.*, was a suit in which Fitzgerald and wife sought to recover from the insurance company damages for wrongfully forfeiting a policy issued by the company to Fitzgerald, for the benefit of his wife. The company was cited by publication, and pleaded to the jurisdiction, that it did not reside or have an office, or agency in Texas, and after this specially answered to the merits. The court held that if the plaintiffs had not met and repelled the force of this plea in abatement, that it should have prevailed and defeated the action, and the opinion further says: "Defendant answered to the merits of the case, but it did not thereby waive the benefit of the plea in abatement."

The case of Liles vs. Woods, 58 Tex., 419, as admitted by Justice Stayton in the opinion in this cause, certainly tends to confirm this view. We therefore conclude that authority, principle and reason uphold our propositions and that the plea to the jurisdiction was not such an answer as forced the plaintiff to submit to the jurisdiction of the District Court. (See also Bradstreet Co. vs. Gill, 72 Tex., p. 115.)

If the opinion of the Supreme Court be correct, still we insist that under the record, F. B. York being a citizen of Missouri, Art. 1242 of the Revised Statutes would no more be binding upon him than Arts. 1230 *et seq.*, which in the opinion of the court have been declared for the first time by the Supreme Court of Texas, so far as counsel are aware, not binding on a citizen of another state in a purely personal action. This brings us to what we conceive so far as this court is concerned to the main question and perhaps the only point to be decided by the court. The position of plaintiff in error may be put into the two following propositions:

Proposition Three.

The opinion of the Supreme Court of Texas, gives to Art. 1242 the effect and purpose of a jurisdictional statute when in fact it was the intention of the Legislature by enacting same, only to regulate matters of practice with reference to the answer of the defendant.

Proposition Four.

The court in its opinion, in giving to Art. 1242 the force of a jurisdictional statute confers the very jurisdiction, it says can not be done by Revised Statute 1230 *et seq.*, and thus seeks to make binding on a non-resident citizen, a statute that can certainly have no more effect in conferring jurisdiction than Revised Statute, Arts. 1230 *et seq.*

Argument on the Preceding Propositions:

These two propositions we will consider together briefly. So far as the first is concerned, we have already fully enlarged on what was evidently the intention of the Legislature of Texas in enacting Revised Statute, Art. 1242. This intention we have shown beyond any question by the report of the Commissioners who framed the statute, by the Legislature enacting it and by comparing same for the purpose of construction with Art. 1262, Revised Statutes, and with Rule 7 of the District Court, that the evident purpose of Art. 1242 was to regulate a question of practice and that alone. That being the case, how we ask, can it have any force as a jurisdictional statute, and particularly how can it have such a binding force on a non-resident citizen, who for the purpose of protecting himself puts in issue, the jurisdiction of the court to hear the cause. Arts. 1230 *et seq.* are enactments of the Legislature of Texas which are not binding on a citizen of another state. Can it then be said that a citizen, who comes under protest for the sole purpose of having the court declare that they are *not* binding upon him, and for no other purpose, can such a defendant, by another statute equally not binding upon him be said to have waived the very right that he has to come in to have adjudicated. What is the use of declaring Arts. 1230 *et seq.* not binding on a non-resident in an action like the one at bar, if by raising the question, the non-resident citizen waives the defense? If Arts. 1230 *et seq.* are not binding on a non-resident defendant, can Art. 1242 be invoked for that purpose? The reason it seems to us so forcibly laid down by Mr. Justice Field in Pennoyer vs. Neff, 95 U. S. 723, applies as much to Art. 1242 as it will to Arts. 1230 *et seq.* when the State Court attempts to make the former binding on the non-resident defendant as a jurisdictional statute. Certainly under the record in this case there was not such an appearance on the part of the plaintiff in error as would give this meaning to the statute.

We desire to call the attention of the court to the fact, that the ground upon which the Supreme Court, based its affirmance was never in any manner raised or referred to in the record in the court below, and it was not until this cause came before the Supreme Court that Revised Statute, Art. 1242 was invoked, and the anomalous meaning given it by the Supreme Court of the State. "A court must *reach* out to maintain in its jurisdiction," if we remember, is a maxim of the black letter law.

In conclusion permit us to say, that if the appearance of the defendant under protest to question the jurisdiction of the court over him sought to be obtained under the process declared to be illegal and unconstitutional, is to be construed into a submission to the court, the time will not be far distant when by statute similar to Art. 1242, every state can compel a non-resident to appear and answer, or suffer the penalty of his default. If Art. 1242 as construed by the Supreme Court of Texas is not in direct violation of the spirit and letter of the Fourteenth Amendment of the Constitution of the United States, then surely Arts. 1230 *et seq.* of the Statutes of Texas, and similar enactments in other states are due process of law, and the conclusion reached in Pennoyer vs. Neff and other cases is wrong, and the effect of the Fourteenth Amendment of the Constitution of the United States is nullified.

Because, under the opinion of the Supreme Court of Texas the plaintiff in error, though having appeared under protest for the sole purpose of questioning the jurisdiction of the court, has been held in court in a manner not warranted by the Constitution of the United States, counsel respectfully ask that the judgment of the Supreme Court be reversed and the cause be remanded that the proper order for its dismissal may be entered.

RUFUS H. THAYER,
Of Counsel for Plaintiff in Error, F. B. York.

Office Supreme Court U. S.
FILED.
MAY 7 1890
JAMES. H. McKENNEY,
CLERK.

No. 1412.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

F. B. YORK, Plaintiff in Error,

v.

STATE OF TEXAS, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF TEXAS.

BRIEF AND ARGUMENT OF THE STATE OF TEXAS, DEFENDANT IN ERROR.

No. 1412.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

F. B. YORK, PLAINTIFF IN ERROR,

v.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF TEXAS.

BRIEF AND ARGUMENT OF THE STATE OF TEXAS, DEFENDANT IN ERROR.

Statement:

The statement of the nature and result of this suit, as set forth in the brief of plaintiff in error, is substantially correct. As the sole question in this case is, Did the District Court of Travis County, Texas, acquire jurisdiction of the person of plaintiff in error by his voluntary appearance in said court, by motion to quash the process and service issued by said court in the case and served upon him in St. Louis, Missouri? defendant in error will present but one counter-proposition in reply to the several assignments of error presented by plaintiff in error.

Defendant in Error's Counter-Proposition:

A voluntary appearance in a case, though only for the purpose of quashing the process and service issued in the case and served upon the party moving to quash, is under the general laws of the State a submission to the jurisdiction of the court in which such motion is made, and operates as an appearance of the party at the next term of said court for all purposes.

Statement:

F. B. York, plaintiff in error, was sued by the State of Texas, defendant in error, in the District Court of Travis County, Texas, to recover of him several thousand dollars due the State for the rent of certain public lands which said York had previously leased from the State. Personal service was had on said York in the City of St. Louis, State of Mo., by delivering to him the citation issued in the case and a certified copy the State's petition filed therein, as required by articles 1230 et seq., Revised Statutes of the State of Texas. Afterward, to-wit, on March 9, 1888, said York appeared in the District Court of Travis County, Texas, by motion to quash the process and service issued and served upon him in said case, for the reason that at the time said process was issued and served upon him, as well as at the time of making the motion to quash, he was a resident citizen of the City of St. Louis, State of Missouri, wherefore said court had no jurisdiction over him. The court overruled the motion to quash, and continued the case by operation of law until the next term. At the next term, to-wit, on October 6, 1888, said York again appeared, demanded a jury trial, paid the jury fee, and had the case transferred to the jury docket. There being a new judge on the bench on October 19, 1888, said York filed a supplemental motion to quash, which, on November 3, 1888, was overruled. On November 14, 1888, the case was called for trial, and said York appearing, but declining to answer further, the court proceeded with the trial of the case, which resulted in a judgment for the State for amount sued for, with legal interest, etc. Said York thereupon appealed the case to the Supreme Court of Texas, in which court the judgment of the court below was in all things affirmed. Said York now brings the case, by writ of error, to this court for revision.

Authorities:

Revised Statutes State of Texas, articles 1242 and 1243; Railroad v. Britt, 61 Texas, 486–7; Keener v. Duff, 66 Texas, 184–5; Rohn v. Greer, 37 Iowa, 630; Wells' Jurisdiction of Courts, section 65.

ARGUMENT.

The attention of the court is especially called to the fact that there is nothing in the statutes of the State of Texas or the rules of practice established for the guidance of proceedings in its courts which made it compulsory upon F. B. York to appear in this case while the same was pending in the District Court of Travis

County. His appearance, therefore, was entirely voluntary. Had he ignored the process served upon him, and the jurisdiction of the court out of which it issued, and made no appearance whatever, then no judgment would have been rendered against him. A judgment under such circumstance would have been void, and it is not to be presumed, *in advance*, that the court would have done a void thing. The presumption is the other way, for it is a well settled rule that in the absence of evidence showing affirmatively the contrary, all presumptions must be indulged in favor of the regularity and correctness of the proceedings of courts of record possessing general jurisdiction. This proposition is so fundamentally true that citation of authorities to sustain it is unnecessary. The district courts of the State of Texas are courts of record, possessing general jurisdiction. Newson v. Chrisman, 9 Texas, 113; Wright v. Fawcett, 42 Texas, 203, and numerous other cases, not necessary to cite The contention of plaintiff in error, that it was necessary for him to appear in the District Court of Travis County, Texas, and move to quash citation and service in order to prevent said court from rendering a void judgment, has no force in it, and must fall to the ground, because based upon the erroneous presumption, or rather assumption, that the court would have rendered a void judgment against him had he not done so. As has been shown, no such presumption can be indulged, hence his appearance was not only voluntary, but made in the face of a general statute which *expressly provided* that if he appeared, though for the special purpose of quashing process and service, such an appearance should work an appearance for all purposes at the next term of the court in which same was made. F. B. York was not bound to appear—no "snap judgment" was taken, nor legerdemain used to get him into court; and having appeared of his own free will and volition, he has no right to complain of the consequences. The same code of laws or statutes which gave him the right to appear and quash the process and service also prescribed and provided what the effect of such an appearance should be. He entered the courts of the State with his eyes open, and with a full knowledge of what the effect of his action would be. He claimed the right and privilege of appearing and quashing the process and service, and it can work no hardship or injustice to require him to submit to and respect the conditions imposed upon the exercise of such a right and privilege.

It is respectfully urged that plaintiff in error has neither law nor equity on his side of the case. He does not deny that he owes the debt sued for, nor the justice of the judgment rendered. He seeks to avoid its payment because, as he alleges, he is a citizen of another State; and after having failed to defeat the debt by his voluntary appearance in the State court in an effort to throw the case out of court, he now appears in this honorable court and asks to be accorded the extraordinary and peculiar privilege of coquetting with the State courts and of making sport of their jurisdiction. The opinion of the Supreme Court of Texas in this case, delivered by Chief Justice Stayton, sustaining the jurisdiction of the District Court of Travis County, and reported in 73 Texas, p. 653, et seq., does not, as urged in the brief of plaintiff in error, give a new construction to the statutes, nor announce a new rule of practice. The construction given and the rule announced was strictly in accordance with former adjudications, as shown by the cases therein cited. The opinion is of itself a conclusive argument in favor of the jurisdiction of the State courts, and should be sustained.

Respectfully submitted.

JAS. ~~H~~ S. HOGG,
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~~and RICH'D H. HARRISON~~,
~~Assistant~~,
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